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In The

Supreme Court of the United States

STATE OF UTAH; UTAH DEPARTMENT OF TRANSPORTATION; ST. GEORGE CITY, a Utah municipal Corporation,

Petitioners,

vs.

SHIVWITS BAND OF PAIUTE INDIANS; KUNZ & CO. dba KUNZ OUTDOOR ADVERTISING, a California Corporation; GALE NORTON, in her capacity as Secretary of the United States Department of the Interior; NEAL McCALEB, in his capacity as Assistant Secretary of Interior, Indian Affairs; WAYNE NORDWALL, in his capacity as Area Director, Bureau of Indian Affairs; and the BUREAU OF INDIAN AFFAIRS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 5 of the Indian Reorganization Act, 42 U.S.C. § 465, authorizes the Secretary of the Interior, "in his discretion," to acquire land "for Indians." Here, the Secretary accepted into trust for the Shivwits Band two parcels along an interstate that were purchased by the Band with a loan from a California company. In exchange, the Band granted the non-Indian company long-term leases allowing billboards that are otherwise prohibited by state and local laws. The question presented is:

> Whether Congress's standardless grant of complete discretion to an Executive branch officer to acquire land "for Indians" is an unconstitutional delegation of legislative power.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the State of Utah, its Department of Transportation, and the City of St. George, Utah, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit is reported at 428 F.3d 966 and reproduced here in the Appendix ("App.") at 1. The unreported opinion of the district court granting summary judgment to respondents is reproduced at App. 57. The unreported, interlocutory ruling on the constitutional question presented here is reproduced at App. 40.

JURISDICTION

The judgment of the Tenth Circuit was entered on November 9, 2005. App. 2. On January 26, 2006, Justice Breyer extended the time to file a petition for a writ of certiorari to and including March 9, 2006. The jurisdiction of the Tenth Circuit was based on 28 U.S.C. § 1291. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 1 of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 8, clause 3 of the Constitution gives Congress authority "[t]o regulate commerce . . . with the Indian Tribes."

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, provides, in relevant part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interest in lands, water rights, and surface rights, and for expenses incident to such acquisitions, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, that no part of such funds shall be used to acquire additional land outside of the exterior boundaries of the Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> * * *
>
> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the

> United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

The entirety of 25 U.S.C. § 465 is reproduced at App. 79.

STATEMENT OF THE CASE

This petition raises the thorny question of whether Congress has abdicated its constitutional duty to make laws by delegating to the Executive branch unrestricted power to take lands – any lands – into trust "for Indians." Because such acquisitions deprive state and local governments nationwide of authority to control the lands' use and development, to tax them, and to assert jurisdiction over them, the issue and the resulting intergovernmental frictions will not disappear until this Court provides a definitive resolution.

1. In mid-1993, Kunz and Company ("Kunz") made a shrewd proposal to the Shivwits Band of Paiute Indians. Kunz would provide the Band up-front money to buy land along Interstate 15 within the St. George, Utah, city limits, in an area where state and local laws prohibit billboards. The Band would then transfer the land to the United States to be held in trust for the Band and give Kunz an exclusive, long-term lease on the land, on which Kunz would erect advertising billboards. App. 5.

The impoverished Band, whose total revenues for 1999 were $90,417, accepted the deal. App. 51. The parties identified two empty parcels far from the Band's reservation, totaling about 2,000 feet of interstate frontage, and purchased them on August 9, 1994 with money from Kunz.

The next day, the Band submitted to the Bureau of Indian Affairs ("BIA") a special warranty deed to the land and an application for the United States to take the land into trust under Section 5 of the Indian Reorganization Act ("the IRA"), 25 U.S.C. § 465.[1] App. 5.

On August 31, 1995, the BIA approved the Band's request for approval of the trust acquisition and accepted the properties into trust. Kunz and the Band thereafter signed five separate, exclusive 20-year leases, approved by the BIA, allowing the erection and maintenance of five billboards. App. 5. Under one sample lease, the Band was to be paid $1,800 per billboard, per year, for the first fifteen years of the lease and $2,500 per year for the last five years; however, the up-front purchase money loaned to the Band constituted prepayment of the first 180 months (15 years) of rent due. App. 82. In contrast, Kunz would earn net income of at least $111,000 per billboard, per year, for a 20-year net income of at least $2.22 million. App. 90.

2. The State of Utah and the City of St. George became aware of Kunz's plan once construction of the billboards began. They tried to halt the work as violative of state and local restrictions on billboard permitting and placement.

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[1] As noted by the Tenth Circuit, in § 465 of the IRA Congress gave the Secretary of the Interior discretionary general authority to take lands into trust "for Indians." App. 9. The Secretary has redelegated exercise of this discretion to the Commissioner of Indian Affairs, who has redelegated it to the Bureau of Indian Affairs Area Directors. *See* 39 Fed. Reg. 32166-67 (Sept. 5, 1974); 34 Fed. Reg. 637 (Jan. 16, 1969). The BIA, however, is not disinterested in the trust land acquisition process since it is, uniquely, a "governing agency" expected to be responsive to the needs of the Indians and Indian tribes it governs. *See Morton v. Mancari*, 417 U.S. 535, 554 (1974).

See Utah Code Ann. §§ 72-7-503 to -507 (West 2004); St. George Code §§ 9-8-2(Q), -4(B)(4). Kunz and the Band filed an action in federal district court under 28 U.S.C. §§ 1331, 1362, seeking a declaration that the land was lawfully held pursuant to Section 5 of the IRA and an injunction preventing the state and local governments from interfering with construction and operation of the billboards. They claimed that the trust lands were not subject to federal, state, or local laws or regulations concerning billboards. App. 62-63.

In their defense, the State and City counterclaimed against the Band and Kunz and cross-claimed against the impleaded federal officials. They sought, *inter alia*, a declaration that Section 5 is an unconstitutional delegation of legislative power because it contains no limits on the Secretary's discretion and no standards against which a reviewing court could test the exercise of the delegated authority. App. 9, 61, 63-64.

3. The district court summarily rejected this constitutional claim, citing *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 1960 (2000). App. 7, 64. The district court also eventually concluded that the trust land, as Indian country, was not subject to state or local billboard restrictions. App. 8, 45, 55.

4. On appeal, the Tenth Circuit affirmed the district court's ruling on the delegation issue based on its prior decision in *Roberts*. App. 10-13. Defendant Roberts had been convicted of violations of the Major Crimes Act, 18 U.S.C. § 1153, which confers on the United States "exclusive jurisdiction over certain offenses . . . committed in Indian Country. . . ." *Roberts*, 185 F.3d at 1129. The crimes occurred on nonreservation land in downtown Durant,

Oklahoma, containing an office complex, acreage that had been taken into trust by the Secretary for the Choctaw Nation. The tribe eventually used the offices as its administrative headquarters, bingo site, and rental space. *Id.*

Roberts challenged the federal district court's exercise of criminal jurisdiction over him for conduct at the office complex. The Tenth Circuit rejected this claim for two reasons. First, the trust land was "Indian country" under the Major Crimes Act, 18 U.S.C. § 1151. *Roberts*, 185 F.3d at 1129-35. Second, the court concluded § 465 of the IRA did not unconstitutionally delegate legislative authority to the Secretary. *Id.* at 1136-37.[2]

In the instant case, the Tenth Circuit reaffirmed this latter conclusion from *Roberts*, holding that "the statute itself provides standards" for the Secretary's exercise of discretion: the land must be acquired "for Indians" and none of the funds appropriated pursuant to § 465 could be used to provide land for Navajos outside their reservation boundaries. App. 11-12. Moreover, the court noted, the legislative history of the IRA identifies Congress's goals of "rehabilitating the Indian's economic life" and "developing the initiative destroyed by . . . oppression and paternalism" of the prior allotment policy. *Id.* (quoting *Roberts*, 185 F.3d at 1137).[3]

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[2] Defendant Roberts, then represented by the current Chief Justice, unsuccessfully petitioned for certiorari review on this issue. Petition for Writ of Certiorari at ii, *Roberts v. United States*, 120 S.Ct. 1960 (2000) (No. 99-1174).

[3] The court also held that the nonconstitutional claims were barred by sovereign immunity or were waived, App. 18, and that the State could not exercise its police powers to regulate billboard placement on these trust lands, which are Indian country. App. 33.

5. In rejecting the constitutional challenge to § 465, the *Roberts* court had uncritically adopted the reasoning of the dissent in *South Dakota v. United States Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995) ("*South Dakota I*"), *vacated and remanded*, 519 U.S. 919 (1996). Recently, two other circuits have done the same, including a new panel of the Eighth Circuit in the latest round of litigation after *South Dakota I*. *South Dakota v. United States Dep't of the Interior*, 423 F.3d 790, 796 (8th Cir. 2005) ("*South Dakota II*"), *reh'g and reh'g en banc denied* (Feb. 6, 2006); *Carcieri v. Norton*, 423 F.3d 45, 57 (1st Cir. 2005), *petition for reh'g pending*.

In *South Dakota I*, the Eighth Circuit had held § 465 unconstitutionally delegated legislative authority to the Executive branch. 69 F.3d at 885. The court – dramatically, though not inaccurately – described the provision as a standardless delegation with so few "boundaries" or "intelligible principles" that "it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." *Id.* at 882.

The Secretary petitioned for certiorari review in June 1996 on the question of the constitutionality of § 465. Faced with the Eighth Circuit's adverse ruling, the Secretary adopted a rule that – for the first time – permitted pre-acquisition judicial review of the Secretary's exercise of discretion under § 465.[4] *See United States Dep't of the Interior v. South Dakota*, 519 U.S. 919, 920-21 (1996) (Scalia, J., dissenting). Previously, the Secretary's unwavering position was just the opposite: no judicial review was

[4] The rule was adopted in 1996 (after the trust acquisition in the instant case) and codified at 25 C.F.R. § 151.12(b). *See* 61 Fed. Reg. 18082-83 (April 24, 1996).

available because § 465 gave the Secretary complete discretion. United States' Petition for Writ of Certiorari at 6-7, *United States Dep't of the Interior v. South Dakota*, 519 U.S. 919 (1996) (No. 95-1956) (hereafter "U.S. Petition").[5] Citing the new rule, the Secretary asked the Court to grant the petition, vacate the decision below, and remand to the Secretary for reconsideration of the decision to take the subject lands into trust. *Id.* at 15, 24. This Court granted the Secretary's unusual request. 519 U.S. at 919. Justices Scalia, O'Connor, and Thomas dissented. They would have granted the writ to address the constitutional issue. *Id.* at 923 (Scalia, J., dissenting).

REASONS FOR GRANTING THE WRIT

> [T]he most significant development in the law over the past thousand years . . . is the principle that laws should be made not by a ruler, or his ministers, or his appointed judges, but by representatives of the people.[6]

This principle is embodied in Article I, Section 1 of our Constitution: "All legislative power shall be vested in a Congress of the United States." From this language, the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of government. *Touby v. United States*, 500 U.S. 160, 165 (1991). The doctrine "has developed to prevent

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[5] *E.g.*, *Fla. Dep't of Bus. Reg. v. United States Dep't of the Interior*, 768 F.2d 1248, 1256-57 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986); 60 Fed. Reg. 32874 (June 23, 1995).

[6] Antonin Scalia, Editorial, *How Democracy Swept the World*, Wall Street J., Sept. 7, 1999, at A24.

Congress from forsaking its duties [to make laws]," *Loving v. United States*, 517 U.S. 748, 758 (1996), but it is also rooted "in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

Although Article I, Section 1 speaks in absolutes, this Court has long recognized that the nondelegation doctrine does not bar Congress from using other branches of government to execute and apply its enactments. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). But, for a delegation of decision-making authority to be constitutionally acceptable, "*Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001) (quoting *Hampton*, 276 U.S. at 409).[7]

Aware of the practical impossibility of Congress spelling out in statute every detail of its policies guiding our increasingly complex society, the Court has upheld delegations of power to another branch under broad, general directives. *Touby*, 500 U.S. at 165; *Mistretta*, 488 U.S. at 372. Nonetheless, a delegation is only "'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta*, 488

[7] As the Tenth Circuit recognized here, App. 11-13, *Whitman* clarified that agency regulations that purport to constrain the otherwise unfettered discretion Congress grants an agency cannot save the statute from a constitutional challenge based on Article I, Section 1. 531 U.S. at 472-73. In any event, agency regulations concerning trust land acquisitions can always be waived by the Secretary "in the best interest of the Indians." 25 C.F.R. § 1.2.

U.S. at 372-73 (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). Significantly, the degree of discretion granted that is acceptable under the nondelegation doctrine "varies according to the power congressionally conferred." *Whitman*, 531 U.S. at 475 (noting Congress must provide "substantial guidance" on setting air standards that affect the national economy).

Petitioners are well aware that the Court has rarely struck down a federal statute as violating Article 1, Section 1. *See Whitman*, 531 U.S. at 474. But if any statute fails under the nondelegation doctrine, it is Section 5 of the IRA.

As the Secretary told this Court a decade ago, Section 5 is a "central component of the IRA," the cornerstone of modern federal law respecting Indians. U.S. Petition at 16 n.6, 17. Yet Section 5 simply grants the Secretary authority to take land into trust "for Indians." It imposes no other relevant, substantive limits on the exercise of this power. Thus, local BIA officials (as the Secretary's subdelegees) are left with carte blanche authority to acquire lands of any size, of any character, for any purpose, in any location. No other federal officer wields such unilateral power.

The instant case typifies the abuse made possible by such an open-ended grant of legislative authority to the Executive branch. Unconstrained by Congress, the Secretary has acquired nonreservation land within the City of St. George and allowed a non-Indian lessee to install billboards, illegal under State and local restrictions, with impunity. The City can no longer tax the land or, absent the Secretary's permission, protect the public health and safety by enforcing land use restrictions that do apply to properties abutting the trust lands. Sadly, the primary

economic benefit from these trust lands does not even inure to the Band but to a non-Indian business that has bought itself – at bargain prices – a valuable exemption from local governmental regulation.

This case cries out for enforcement of the nondelegation doctrine as a curb on congressional abdication of its duty to make laws, as well as a tool for ensuring appropriate separation of powers between the legislative and executive branches of government. The Tenth Circuit's application of the nondelegation doctrine to Section 5 conflicts with this Court's precedents and ignores the serious impingements on state sovereignty and local authority that trust land acquisitions cause. Although the Court has twice declined to do so,[8] it should seize this opportunity to answer the important and recurring question of whether Section 5 of the IRA violates Article I, Section 1 of the Constitution by giving absolute discretion to the "ruler" and his "ministers" to determine whether, when, how, where, and why to acquire land in trust "for Indians."

I. THE CIRCUIT COURT'S APPLICATION OF THE NONDELEGATION DOCTRINE TO SECTION 5 OF THE IRA CONFLICTS WITH THIS COURT'S PRIOR DECISIONS.

A. *Mistretta* and *Whitman* require Congress to legislate a policy and standards for its implementation, both absent here.

The Tenth Circuit upheld Section 5, reasoning that "the statute itself" provides standards for the Secretary's

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[8] *Roberts v. United States*, 120 S.Ct. 1960 (2000); *United States Dep't of the Interior v. South Dakota*, 519 U.S. 919 (1996).

exercise of discretion because trust lands must be acquired "for Indians" and appropriated funds cannot purchase off-reservation land for the Navajos. App. 11-12. This conclusion, which the First and Eighth Circuits also recently adopted,[9] is inconsistent with the nondelegation doctrine crafted by the Court, which requires Congress to legislate a general policy and the boundaries of the agency's delegated authority. *Mistretta*, 488 U.S. at 372. In Section 5, Congress has provided neither.

First, although Section 5 prohibits the Secretary from using funds appropriated under it to expand the Navajo reservation, this is no restriction on the Secretary regarding non-Navajos, such as the Band. In any case, this funding provision has no relevance where, as here, the trust lands were purchased by the Indians, not by the Secretary.

Second, the directive to the Secretary to acquire lands in trust "for Indians" is, at best, a declaration of the ultimate congressional goal at which Section 5 aims. Although it surely precludes the Secretary from acquiring trust lands "for Italian-Americans," it does not state a "policy," in the usual sense, i.e., "a definite course or method of action selected . . . from among alternatives and in the light of given conditions to guide and usu[ally] determine present and future decisions." *Webster's Third New Int'l Dictionary* 1754 (1993).

Even if the phrase "for Indians" were charitably viewed as stating a general policy of increasing the quantity of lands held by the United States "for Indians,"

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[9] *Carcieri*, 423 F.3d at 57-58; *South Dakota II*, 423 F.3d at 797.

neither Section 5 nor the rest of the IRA supplies "an intelligible principle to which [the Secretary] is directed to conform" in doing so, required by *Whitman*. 431 U.S. at 472. Congress has set no boundaries on the Secretary's exercise of discretion to acquire lands "for Indians"; thus, the Secretary is free to fill in the blanks and acquire any land, anywhere, for any purpose as long as it is for an Indian tribe or individual Indian. The acquisition could be of one city lot in a subdivision, ten acres along Main Street in downtown Salt Lake City, or the entire State of Iowa. If § 465 can be used, as here, to circumvent local billboard laws, it can be used to circumvent other local restrictions, such as those limiting siting of sexually explicit businesses. As the Eighth Circuit aptly summarized it in *South Dakota I*, "[t]he result is an agency fiefdom whose boundaries were never established by Congress, and whose exercise of unrestrained power is free of judicial review. It is hard to imagine a program more at odds with separation of powers principles." 69 F.3d at 885.

Importantly, Section 5 of the IRA is very different from other statutes upheld by the Court as constitutional delegations of legislative power. *Mistretta*, for example, upheld a delegation to "an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines" consistent with the "significant statutory direction" provided by Congress. 488 U.S. at 412. In contrast, acquiring land for Indians is not a subject that requires the expertise of an elite corps of civil servants to provide detailed standards. In addition, there are no statutory terms in Section 5 that can be narrowly construed to avoid unconstitutionality, *see id.* at 373 n.7, or that have established meanings in another context that can be imported into Section 5, *see, e.g., Am. Power & Light*

Co., 329 U.S. at 104 ("Even standing alone, standards in terms of unduly complicated corporate structures and inequitable distributions of voting power cannot be said to be utterly without meaning, especially to those familiar with corporate realities."). Nor would greater specificity by Congress be insignificant or impossible, as in *Whitman*. 531 U.S. at 473-74 (upholding a delegation to EPA to set ambient air quality standards, "allowing an adequate margin of safety," that are "requisite to protect public health"); *see also Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943) ("[P]ublic interest, convenience, or necessity" standard is "'as concrete as the complicated factors for judgment in such a field of delegated authority permit.'").

Instead, Section 5 is like the statutes held to violate the nondelegation doctrine in *Pan. Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). In *Panama Refining Co.*, the offending statute empowered the Executive to prohibit transport of petroleum produced or withdrawn from storage in excess of the amounts permitted by state laws. 293 U.S. at 415. In *Schechter Poultry*, the Live Poultry Code authorized the Executive to approve a code of fair competition for an industry in order to rehabilitate it. 295 U.S. at 541-42. Both statutes, enacted by the same Congress as the 1934 IRA, were struck down because, as this Court recently put it, "Congress had failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 374 n.7; *see Pan. Refining Co.*, 293 U. S. at 430; *Schechter Poultry*, 295 U.S. at 541-42. Section 5 suffers from the same glaring deficiencies.

B. *Whitman* precludes resort to legislative history, which, in any event, does not supply the requisite "intelligible principle" guiding the Secretary's discretion.

To fortify its conclusion that the statute itself provides limiting standards against which the Secretary's Section 5 acquisitions can be assessed, the Tenth Circuit noted that the legislative history of the IRA identified Congress's goals: rehabilitating the Indian's economic life and developing Indian initiative. App. 11-12 (quoting *South Dakota I*, 69 F.3d at 887-88 (Murphy, J., dissenting) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73rd Cong., 2d Sess., at 6 (1934))). Other circuits have used the same cases and language to support their decisions upholding Section 5. *Carcieri*, 423 F.3d at 57-58; *South Dakota II*, 423 F.3d at 797-98.

This Court made it clear in *Whitman*, however, that it is inappropriate to look to legislative history to provide the intelligible principle guiding and limiting an agency's exercise of delegated power. "*Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman*, 531 U.S. at 472 (quoting *Hampton*, 276 U.S. at 409). Congressional reports and statements from the floor of the House or Senate do not constitute a "legislative act."

Even if the cited legislative history of the 1934 IRA were an appropriate source for nondelegation doctrine analysis, it still provides no standards to guide the Secretary's exercise of discretion in acquiring land "for Indians." It simply restates the purpose of Congress in enacting the

IRA.[10] Thus, it would be fair to say that Section 5 broadly empowers the Secretary to acquire trust lands "for Indians" in order to achieve the congressional purpose of acquiring land for Indians. But this tautology imposes no meaningful constraints on the Secretary, as every acquisition under Section 5 is "for Indians," regardless of who else is benefitted or harmed by it.

To be sure, if Congress had enacted standards in Section 5 or elsewhere, they could be fleshed out by reference "to the purpose of the [IRA], its factual background, and the statutory context in which they appear." *Am. Power & Light Co.*, 329 U.S. at 104. In *Mistretta*, for example, the Court looked to legislative history to add content to the numerous factors, *provided in the statute itself*, that were to guide the Sentencing Commission's adoption of sentencing guidelines. 488 U.S. at 376 n.10. Here, however, there are no statutory standards to be fleshed out. There is only Congress's wholesale abdication of its law-making authority to the Secretary, who is simply authorized to take lands into trust "for Indians."

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[10] Ironically, the legislative history specifically addressing Section 5 – which the Tenth, Eighth, and First Circuit panels have chosen to ignore – shows that Congress's original intent was to acquire rural lands in trust for landless Indians, to be used by them for agrarian purposes (farming, grazing, and logging). *See* H.R. Rep. No. 1804, 73rd Cong., 2d Sess., 6-7; 78 Cong. Rec. 11729-30 (June 15, 1934) (discussed in *South Dakota I*, 69 F.3d at 883-85). But these narrow purposes were not incorporated into the statute as enacted.

II. THE EXECUTIVE BRANCH'S UNBRIDLED POWER TO ACQUIRE NONRESERVATION LAND "FOR INDIANS," IMMUNIZING IT FROM LOCAL REGULATION, IMPOSES SIGNIFICANT HARDSHIPS ON STATE AND LOCAL GOVERNMENTS NATIONWIDE.

It is hard to overstate the adverse impacts of the Secretary's exercise of her broad, uncabined discretion under Section 5. Every time the Secretary's BIA subordinates take land into trust pursuant to Section 5, a state loses the sovereign power to enforce its laws consistently within its own boundaries.

As this case exemplifies, the Secretary's unfettered ability to acquire trust lands anywhere creates scattered trust land "islands" where tribal or federal law, not state or local law, applies. The Court has already recognized the practical problems that result from such fragmentation: "A checkerboard of alternating state and tribal jurisdiction . . . would 'seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches." *City of Sherrill, N.Y. v. Oneida Nation of N.Y.*, 544 U.S. 197, ___ (2005) (quoting *Hagen v. Utah*, 510 U.S. 399, 421 (1994)).

Trust lands determined to be Indian country, like those here, are removed from state criminal jurisdiction for some serious crimes committed there by or against Indians. *E.g.*, *Roberts*, 185 F.3d at 1133 (federal court has jurisdiction over Indian defendant where serious crime covered by Major Crimes Act was committed on trust

lands held to be Indian country).[11] For other crimes in Indian country, either the federal government, the tribe, or both have criminal jurisdiction. *See* 18 U.S.C. §§ 1152, 1153.

A property's status as Indian country is also the touchstone for determining if a state can assert civil jurisdiction over Indians. *See DeCouteau v. Dist. County Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 427 n.2 (1975) (§ 1151 expressly addresses criminal jurisdiction, but generally applies as well to questions of civil jurisdiction).[12] And local governments' ability to regulate civilly the activities of non-Indians in Indian country is determined using a discrete pre-emption analysis that balances competing tribal and governmental interests. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

Even if trust lands are not, as here, held to be Indian country, placement of land into trust puts it largely beyond the control or oversight of local authorities. The Secretary has already sweepingly legislated that trust lands are not subject to "the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights," 25 C.F.R.

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[11] This is not so as to Indian country over which a state has taken jurisdiction pursuant to Public Law 280, 18 U.S.C. § 1162.

[12] *But see* 28 U.S.C. § 1360(a) (enumerating several states that have been granted jurisdiction over civil causes of action to which Indians are parties, notwithstanding that they arose in identified areas of Indian country and providing that general civil state laws apply there). Even this grant does not permit encumbrance, state taxation of trust lands, or local regulation that conflicts with federal law. *See id.* § 1360(b).

§ 1.4.(a), unless the Secretary decides they should be, *see id.* § 1.4.(b). Local communities are thus stripped of the ability to enforce needed land use and development restrictions uniformly on trust lands within their borders, to the detriment of the health, safety, and welfare of all citizens, Indian and non-Indian, and to the benefit of trust land lessees like Kunz.

In this way, the Secretary allows Indians to market to non-Indians their exemption from state and local government regulation. This practice has already been prohibited by the Court in the context of state taxes of on-reservation cigarette purchases by non-Indians: "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Washington v. Confed. Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980).

There are also financial ramifications for local governments, as Section 5 itself renders trust lands tax-exempt. 25 U.S.C. § 465 ("lands or rights shall be exempt from State and local taxation"); *see also Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998) (Section 5 sets forth "procedure by which lands held by Indian tribes may become tax exempt"). States and local communities may thus lose significant revenues when lands are taken into trust.[13]

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[13] Despite their loss of authority over, and revenue from, trust lands, state and local governments may still be held responsible for providing services to these tax-exempt properties. *See, e.g., Chase v. McMasters*, 573 F.2d 1011, 1019 (8th Cir.) (Indian plaintiff stated § 1983 damage claim for violation of § 465 against municipal officials who

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It is no consolation that the Secretary, after the acquisition here, adopted rules requiring the BIA to notify state and local governments of a proposed trust land acquisition, 25 C.F.R. § 151.11,[14] to postpone the actual taking of title to the property until the end of a 30-day comment period, *id.* § 151.12(b), and to no longer oppose judicial review of its final acquisition action under the Administrative Procedures Act during that limited period, *see* 61 Fed. Reg. 18082 (April 24, 1996) (summary).

Even if Petitioners had been given prior notice and the opportunity for judicial review under the APA, nothing prevents the Secretary from taking title at the close of the comment period, notwithstanding timely opposition from local governments based on the proposed acquisition's violation of local or federal laws or even on the BIA's failure to follow its own acquisition process rules. And once the United States takes title in trust, as the Tenth Circuit has held and the Secretary has consistently maintained, the remedies of divestiture of the United States or invalidation of the conveyance of title to it become unavailable under the APA because of the exemption of trust lands

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refused to connect city water and sewer lines to her land, held in trust by United States), *cert. denied*, 439 U.S. 965 (1978); *Fallon Paiute-Shoshone Tribe v. City of Fallon*, 174 F. Supp. 2d 1088, 1091-93 (D. Nev. 2002) (tribe alleging city refused to provide services to trust land stated § 1983 claim).

[14] At the time of the acquisition here, notice to the state and local governments was not expressly required by the Secretary's regulations. App. 19. The BIA sent the City a letter about the Band's intent to purchase the properties, with no mention of the planned advertising purpose. The State, however, was not notified, *see* App. 4, even though 25 C.F.R. § 151.10(e) then required the Secretary to consider the impact that removing the lands from the tax rolls would have on the State and its political subdivisions.

from the waiver of the federal government's immunity in the Quiet Title Act, 28 U.S.C. § 2409a(a). App. 15; *see United States Dep't of the Interior*, 519 U.S. at 921 (Scalia, J., dissenting).

The Tenth Circuit's scant nondelegation analysis of Section 5 ignores the nationwide scope and impact of the power this provision confers on local BIA bureaucrats. *See Mistretta*, 531 U.S. at 475. The unbounded authority of the Executive branch to stockpile lands "for Indians" under Section 5 and insulate them from state and local control is important across the country, not just to a few states in the West. At the end of 1997, more than 56 million acres in 36 states were already held in trust by the Secretary. *See* U.S. Dep't of the Interior, "Lands under the Jurisdiction of the Bureau of Indian Affairs as of December 31, 1997." In 1999, the Department of the Interior estimated that it receives 7,000 trust and acquisition applications annually. 64 Fed. Reg. 17574-75 (April 12, 1999).

There are no signs that the glut of applications is subsiding. On the contrary, it will likely grow as non-Indian enterprises like Kunz recognize how easily Section 5 can be exploited to avoid legitimate state laws and land use or development restrictions. There is no shortage of opportunities: three years ago, there were 560 federally-recognized Indian tribes in the United States and hundreds more tribal recognition petitions pending at the BIA. 67 Fed. Reg. 46328 (July 12, 2002). Likewise, as long as the Secretary wields unconstrained and unreviewable power to alter local tax bases and jurisdictional boundaries by taking lands into trust "for Indians," there is no reason to expect that tensions between state and local governments on the one hand and tribes and the BIA on the other – evidenced by decades

of litigation in this case, *Carcieri*, and *South Dakota I* and *II* – will do anything but increase.

Trust land acquisitions under Section 5 can disturb the balance of power between the State and the federal governments, as well as that between the State and local governments and the tribes within their borders, creating chaotic jurisdictional checkerboards. Moreover, unconstrained by any meaningful congressional limits on the Secretary's authority under § 465, the Tenth Circuit has given Indians the green light to market their exemption from state and local regulation. If such circumvention of the laws is permitted by § 465, then certainly there are no "boundaries of this delegated authority," required by the "intelligible principle" standard, sufficient to satisfy Article I, Section I of the Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2006

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SHIVWITS BAND OF PAIUTE INDIANS and KUNZ & COMPANY, d/b/a KUNZ OUTDOOR ADVERTISING,

Plaintiffs-Counterclaim Defendants-Appellees,

v.

STATE OF UTAH; UTAH STATE DEPARTMENT OF TRANSPORTATION; ST. GEORGE CITY, a Utah Municipal corporation,

Defendants-Counterclaim Plaintiffs-Appellants,

GAYLE NORTON, in her capacity as Secretary of the United States Department of the Interior; NEAL A. McCALEB, in his capacity as Assistant Secretary of the Interior Indian Affairs; WAYNE NORDWALL, in his capacity as Area Director of the Bureau of Indian Affairs; and the BUREAU OF INDIAN AFFAIRS,

Third-Party Defendants-Appellees.

No. 03-4274

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 2:95-CV-1025-TC)

(Filed November 9, 2005)

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Ellen J. Durkee, Attorney, Environment & Natural Resources Division, United States Department of Justice, Washington, DC (Todd S. Aagaard, Attorney, United States Department of Justice, Washington, DC, Thomas L. Sansonetti, Assistant Attorney General, Washington, DC, Paul M. Warner, United States Attorney, Salt Lake City, UT, John K. Mangum, Assistant United States Attorney, Salt Lake City, UT, Thomas A. Blaser, of counsel, Office of the Solicitor, United States Department of the Interior, Washington, DC, and William R. McConkie, Office of the Regional Solicitor, United States Department of the Interior, Salt Lake City, UT, with her on the briefs), for the Federal Appellees.

Before **BRISCOE, KELLY,** and **LUCERO,** Circuit Judges.

BRISCOE, Circuit Judge.

The State of Utah, the Utah State Department of Transportation, and the City of St. George, Utah (collectively the defendants), appeal from the district court's grant of summary judgment in favor of plaintiffs Kunz and Company and the Shivwits Band of Paiute Indians holding that defendants lacked authority to regulate billboard advertising displays erected by Kunz on land held in trust by the federal government for the Band. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I.

Factual background

In July 1993, Kunz and Company, d/b/a Kunz Outdoor Advertising (Kunz), a California corporation, approached the Shivwits Band of Paiute Indians (the Band) and proposed that the Band purchase, with money provided by Kunz, land south of St. George, Utah (the City) along the Interstate 15 corridor, transfer that land to the federal government to be held in trust for the Band, and lease the land to Kunz on a long-term basis so that Kunz could erect and maintain advertising billboards thereon. The Band, eager to pursue economic development opportunities that would increase its meager revenue stream, accepted Kunz's proposal in October 1993. In November 1993, Kunz and the Band identified two parcels of land adjacent to

Interstate Highway 15 in an undeveloped area within the City limits.[1] After several months of negotiations, the private owners of the parcels agreed in May 1994 to sell them to the Band.

The Bureau of Indian Affairs (BIA), aware of the relationship between Kunz and the Band, contacted the City's manager on July 7, 1994, orally advised him that the Band intended to purchase the two parcels of land, and asked if the City "would provide a letter of support for this endeavor" to the Band. App. at 128A. The City's manager allegedly refused to provide such a letter because the City was "afraid the land would be used for the purpose of erecting outdoor advertising signs and the City was opposed to [such] signs." *Id.* On August 1, 1994, the BIA sent a letter to the City again stating that the Band was "in the process of purchasing two small parcels of land located in an undeveloped area of" the City. Fed. Aplee. Supp. App., at 1. The letter proceeded to identify the two parcels in detail by location and tax identification numbers. The letter concluded by again asking the City to support the Band's endeavor. According to the record, the City did not respond to the BIA's letter.[2] App. at 131.

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[1] The first parcel "consists of 14.25 acres with more than 1,147 feet of . . . frontage" on Interstate 15. App. at 174. The second parcel "consists of 11.07 acres" and "has approximately 771 feet of I-15 frontage. . . ." *Id.* Both parcels are located south of the Bloomington Exit on the east side of I-15 in the City. *Id.*

[2] At that time, applicable federal regulations did not require the BIA to notify either the state or local government of a proposed trust acquisition. App. at 150. The applicable federal regulations were subsequently modified, and now require the BIA to notify "the state and local governments having regulatory jurisdiction over the land to be acquired," and provide those governments with a thirty-day time period

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On August 9, 1994, the Band purchased the parcels from the private owners. One day later, on August 10, 1994, the Band tendered a special warranty deed to the BIA that purported to transfer the parcels into trust. Because an off-reservation trust acquisition must be formally approved by the BIA, the Band also submitted an application and supporting documents to the BIA requesting such approval. *Id.* at 36, 128A, 131.

In reviewing the Band's application, the BIA concluded, consistent with its then-existing policies, that no environmental assessment (EA) was required for the act of taking the parcels into trust. App. at 36, 131. More specifically, the BIA classified as "categorically excluded" (i.e., not requiring an EA) any proposed trust acquisition in which there would be "no immediate change in the use of the land." *Id.* at 131. The BIA did, however, require an EA to be prepared regarding the proposed leasing of the parcels to Kunz and the related use of the land for outdoor advertising displays. That EA was completed on July 6, 1995. A "Finding of No Significant Impact" (FONSI) was subsequently issued by the BIA on August 31, 1995.

On the same date the FONSI was issued, i.e., August 31, 1995, the BIA approved the Band's request for approval of the trust acquisition and formally accepted the properties into trust. Thereafter, Kunz and the Band finalized, and the BIA approved, five separate leases covering the two parcels and permitting Kunz to erect and maintain a total of five advertising billboards thereon.

"in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction. . . ." 25 C.F.R. § 151.11(d) (2004).

On October 25, 1995, shortly after Kunz began construction of the billboards, the Utah Attorney General's office, on behalf of the Utah Department of Transportation, threatened criminal suit against Kunz if the construction did not immediately cease. Kunz ignored the warning and continued construction. On November 3, 1995, the City issued a stop work order, forbidding Kunz from further construction of the signs on the grounds that it violated state and local outdoor advertising regulations, and Kunz had no city or state sign permits.

Procedural background

On November 17, 1995, Kunz and the Band filed this action against defendants seeking a declaratory judgment and preliminary and permanent injunctive relief. More specifically, Kunz and the Band sought an order declaring that the property at issue was lawfully held by the Band, and injunctive relief restraining defendants from interfering with the construction and operation of the billboards. Defendants filed an answer and counterclaim against plaintiffs and a third-party claim against the United States. *Id.* The counterclaim and third-party claim alleged "that (1) the statute authorizing land acquisitions, 25 U.S.C. § 465 (and the accompanying regulation, 25 C.F.R. § 1.4)[wa]s unconstitutional; (2) the taking of the land in trust and the approval of the lease . . . violated the National Environmental Policy Act ("NEPA") and . . . [Department of the Interior (DOI)] . . . regulations; and (3) the erection of billboards on the property violate[d] certain state and local regulations." App. at 38.

The parties subsequently filed their first round of summary judgment motions.[3] On August 11, 2000, the district court issued an order ruling on those motions. In pertinent part, the district court concluded that: (1) 25 U.S.C. § 465 was not an unconstitutional delegation of legislative power; (2) the BIA acted arbitrarily and capriciously in determining that the acquisition of the land was subject to a categorical exclusion and that it was therefore unnecessary to conduct an EA prior to the acquisition; (3) the failure to comply with the procedural requirements of NEPA and conduct a pre-acquisition EA was "more than de minimus," App. at 15; and (4) "[t]he failure to prepare any NEPA review of the land acquisition was a procedural harm that frustrated NEPA's goals. . . ." *Id.* at 52. Accordingly, the district court ordered "that the required NEPA process be undertaken." *Id.* at 53. The district court's order stated, however, that the order "did not affect the fact that the government held the land in trust by special warranty deed. . . ." *Id.* at 60. Instead, it purported to "invalidate the agency's decision to take the land in trust until the BIA complied with the procedural requirements of NEPA." *Id.*

Defendants subsequently moved for summary judgment on the issue of whether they had authority to regulate the land at issue. In pertinent part, defendants argued that the two parcels of land were neither held in trust for the Band nor constituted "Indian Country." The district court denied defendants' motion on February 6,

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[3] On February 7, 1996, the district court issued a preliminary injunction prohibiting defendants from imposing any stop work order or otherwise interfering with the construction or use of the billboards. Protected by this injunction, Kunz completed construction of the five billboards and leased the billboard space to various advertisers.

2002. In doing so, the district court concluded that "the Indian Lands exemption in [the] Quiet Title Act, 28 U.S.C. § 2409a(a) . . . , applie[d]," and thus "the government [wa]s immune from questions to the title" to the land. *Id.* at 61. The district court further concluded that, because the BIA "ha[d] not completed the NEPA process as was mandated [in] the [court's] August 11, 2000 order," there was "no final agency decision which settle[d] the status of the land at issue." *Id.*

On March 17, 2003, the district court conducted a status conference, at which time the BIA indicated it had completed the court-ordered EA and "ha[d] approved a Finding of No Significant Impact (FONSI) for the Shivwits Band fee-to-trust land transfer and outdoor advertising leases. . . ." *Id.* at 169. The BIA further indicated that it would not "seek . . . to remove the land from trust status . . . or . . . remove approval of the five billboard leases." *Id.*

At the direction of the court, the parties subsequently filed cross motions for summary judgment concerning the remaining issues in the case. On October 22, 2003, the district court issued an order granting summary judgment in favor of the plaintiffs. In that order, the district court concluded that defendants lacked "the authority to impose restrictions on the placement of billboards on" the land at issue. *Id.* at 74. More specifically, the district court concluded that because the land at issue was held in trust by the BIA for the Band, it constituted "Indian Country" under 18 U.S.C. § 1151 and thus was exempt from state and local regulation. *Id.* at 77. The district court also concluded "that even if the [Highway Beautification Act of 1966, 23 U.S.C. § 131,] applie[d] to the trust land at issue . . . , the Act [wa]s subject to federal (not state) enforcement, and [thus] d[id] not expressly authorize the regulation intended by Utah

and St. George." *Id.* at 79. On that same date (October 22, 2003), the district court entered a judgment in favor of plaintiffs stating the defendants "ha[d] no authority, express or implied, to regulate Kunz's placement of billboards on the subject property, held in trust for the" Band. *Id.* at 90.

II.

Defendants assert a number of arguments on appeal. Broadly speaking, defendants contend that the statute authorizing acquisition of the land is unconstitutional, that the acquisition of the land and approval of the lease agreements violated applicable environmental laws and procedural regulations, and that they possess the authority to regulate the property and billboards at issue. As outlined in greater detail below, we find no merit to any of these arguments.

Does § 465 of the Indian Reorganization Act violate the non-delegation doctrine?

The trust acquisition of the properties at issue was completed pursuant to § 465 of the Indian Reorganization Act (IRA). Section 465 provides, in pertinent part, as follows:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided,
>
> That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
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> * * *
>
> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired. . . .

25 U.S.C. § 465.

In the course of the district court proceedings, defendants challenged the trust acquisition on the grounds that § 465 was "an unconstitutional delegation of legislative power because it contain[ed] no limits on the Secretary's discretion and no standards against which a reviewing court c[ould] test the exercise of delegated power." Aplt. Br. at 8. The district court rejected that argument, noting that this court had rejected a similar argument in *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999). Defendants now challenge the district's ruling on appeal. We apply a de novo standard of review. *See United States v.*

Weed, 389 F.3d 1060, 1067 n.6 (10th Cir. 2004) ("We review challenges to the constitutionality of a statute de novo.") (internal quotations omitted).

Where, as here, a party has challenged a federal statute on the grounds that it violates the "nondelegation doctrine," "the constitutional question is whether the statute has delegated legislative power to the agency." *Whitman v. American Trucking Assoc., Inc.*, 531 U.S. 457, 472 (2001). "Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.'" *Id.* "This text permits no delegation of those powers . . . and so [the Supreme Court] repeatedly ha[s] said that when Congress confers decisionmaking authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Id.* (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

In *Roberts*, a criminal case, the defendant was charged with and convicted of violations of the Major Crimes Act, 18 U.S.C. § 1153, which "confers on the United States exclusive jurisdiction over certain offenses . . . committed in Indian Country. . . ." 185 F.3d at 1129. On appeal, the defendant challenged the district court's exercise of jurisdiction, arguing, in part, that § 465 of the IRA "unconstitutionally delegate[d] standardless authority to the Secretary" of the DOI. *Id.* at 1136. This court rejected the defendant's challenge to the constitutionality of § 465. In doing so, this court stated:

> [W]e have previously acknowledged the statute [§ 465] itself places limits on the Secretary's discretion. (citation omitted). * * * For example, the statute provides any land must be acquired for

> Indians as defined in 25 U.S.C. § 479 and funds appropriated for the acquisitions may not be used to provide land for Navajos outside their reservation boundaries. (citation omitted). And, the legislative history identifies goals of "rehabilitating the Indian's economic life" and "developing the initiative destroyed by . . . oppression and paternalism" of the prior allotment policy and indicates the Secretary must assure continued "beneficial use by the Indian occupant and his heirs." (citation omitted).

Id. at 1137. The *Robert's* court also rejected the defendant's alternative argument that, "even if the trust process c[ould] . . . survive a delegation challenge, it [wa]s only by virtue of the [BIA] regulations enacted in 1980, and subsequently amended, which place[d] additional limits on the Secretary's discretion and facilitate[d] judicial review." *Id.* at 1136 n.8. More specifically, the *Robert's* court stated: "we disagree based on our belief the statute itself provides standards for the Secretary's exercise of discretion." *Id.*

The decision in *Roberts* is clearly binding on the panel in this case, "absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam). Obviously recognizing that rule, defendants assert that *Whitman* constitutes just such a superseding contrary decision by the Supreme Court. According to defendants, *Whitman* "modernized the non-delegation doctrine," Aplt. Br. at 8., by (a) clarifying that an agency cannot "cure an unconstitutionally standardless delegation of power by declining to exercise some of that power," *id.* at 9-10 (quoting *Whitman*, 531 U.S. at 473), and (b) establishing that the necessary "intelligible principle" that must be laid down by Congress "must be found within the 'four corners

of the statutory language' itself, rather than being inferred from the legislative history." *Id.* at 11 (quoting *Whitman*, 531 U.S. at 473).

We reject defendants' arguments. To begin with, only the first of the two principles cited by defendants is discussed in *Whitman* (i.e., that an agency cannot cure a non-delegation problem by declining to exercise some of the power). The second alleged principle, i.e., that the "intelligible principle" must be derived solely from the statutory text, rather than the legislative history, is nowhere to be found in *Whitman*. Rather, that "principle" comes from the Eighth Circuit's now-vacated decision in *South Dakota v. United States Department of the Interior*, 69 F.3d 878, 882 (8th Cir. 1995), *vacated by* 519 U.S. 919 (1996).[4] Moreover, a reading of the entire *Whitman* decision indicates that the Court did not rewrite or "modernize" the non-delegation doctrine. To the contrary, the Court reviewed in detail and applied its past precedent concerning the non-delegation doctrine. Importantly, for purposes of this appeal, that precedent was in existence at the time this court issued its decision in *Roberts*. Moreover, it is worth noting that the Court in *Whitman* emphasized that it "ha[d] 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment

[4] A review of defendants' appellate brief suggests that they are relying not so much on *Whitman*, but rather on *South Dakota*, in which a panel of the Eighth Circuit, in a 2-1 decision, concluded that § 465 violated the non-delegation doctrine. Notably, however, the Supreme Court ultimately vacated that decision, with a majority of the Court choosing not to publish an opinion explaining their reasoning for doing so. Thus, the Eighth Circuit's decision has no precedential value. Moreover, the panel in *Roberts* made note of *South Dakota*, but ultimately chose to adopt the position of the dissenting judge in that case.

that can be left to those executing or applying the law.'" 531 U.S. at 474-75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)). Indeed, the Court noted that only on two occasions in its history (the last time in 1935) had it "found the requisite 'intelligible principle' lacking" in a challenged statute. *Id.* at 474.

Since the issuance of *Whitman*, the First Circuit has agreed with *Roberts* that § 465 does not amount to an unconstitutional delegation of legislative power. In reaching that conclusion, the First Circuit cited *Whitman*, but made no mention of it having altered or "modernized" the non-delegation principles that were in place when *Roberts* was decided. *See Carcieri v. Norton*, 398 F.3d 22, 32-34 (1st Cir. 2005).

In sum, we conclude *Whitman* does not constitute a "superseding contrary" decision that would allow us to ignore the holding in *Roberts*. Thus, consistent with *Roberts*, we reject defendants' assertion that § 465 of the IRA violates the non-delegation doctrine.

Indian Lands Exception to Quiet Title Act

Defendants contend the district court erred in concluding that the Indian lands exception to the Quiet Title Act (QTA) precluded it from reviewing and remedying any alleged shortcomings in the process of taking the land at issue into trust (i.e., the BIA's alleged failure to conduct a pre-acquisition EA). Because this issue implicates the district court's subject matter jurisdiction, we review it de novo. *See Neighbors for Rational Development v. Norton*, 379 F.3d 956, 960 (10th Cir. 2004).

The QTA "contains a limited waiver of sovereign immunity" that "allows the United States to 'be named as a party defendant in a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest in water rights.'" *Neighbors*, 379 F.3d at 961 (quoting 28 U.S.C. § 2409a(a)). Notably, however, the QTA "does not 'apply to trust or restricted Indian lands.'" *Id.* "'Thus, when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the [QTA] does not waive the Government's immunity.'" *Id.* (quoting *United States v. Mottaz*, 476 U.S. 834, 843 (1986)).

"It is well settled law the [QTA's] prohibition of suits challenging the United States' title in Indian trust land may prevent suit even when a plaintiff does not characterize its action as a quiet title action." *Id.* Thus, in determining whether a particular claim falls within the scope of the QTA's prohibition, a reviewing court "must focus on the relief . . . request[ed]," rather than on the party's characterization of the claim. *Id.*

In *Neighbors*, an organization of landowners, business owners, and homeowners filed suit against the Secretary of the DOI alleging that she improperly placed into trust for nineteen Pueblos of New Mexico a parcel of land without first complying with NEPA. More specifically, the plaintiff organization alleged that the Secretary should have conducted an EA prior to taking the land into trust because she contemplated a post-acquisition change in land use (i.e., transforming the property from a site once used for an Indian school to a site for commercial office space). The district court reviewed the plaintiff organization's claim on the merits and, after initially concluding

that the Secretary's decision to accept the land into trust was arbitrary and capricious, ultimately "determined the Secretary had not acted arbitrarily and capriciously" in taking the land into trust. 379 F.3d at 960. The plaintiff organization then appealed the district court's ruling.

On appeal, this court agreed with the Secretary that the plaintiff's suit effectively challenged the United States' title to the property and thus fell within the scope of the QTA's Indian trust land exemption. In doing so, the court reviewed the legislative history of the QTA and concluded it was "clear" that "Congress' intent in excluding Indian trust lands from the [QTA's] waiver of sovereign immunity was to prevent adverse claimants from interfering with the United States' obligations to the Indians." *Id.* at 962. "Although [the plaintiff organization] [wa]s not an adverse claimant in the sense it [wa]s not seeking to gain title to the . . . property [at issue]," the court nevertheless concluded that "the Indian trust land exemption applie[d] with equal force. . . ." *Id.* According to the court, "[i]f Congress was unwilling to allow a plaintiff claiming title to land to challenge the United States' title to trust land," it was "highly unlikely Congress intended to allow a plaintiff with no claimed property rights to challenge the United States' title to trust land." *Id.*

The court in *Neighbors* also rejected the plaintiff organization's assertion that the Secretary's decision to take the land at issue into trust was reviewable under the Administrative Procedures Act. According to the court, "judicial review is only available under the Administrative Procedures Act and [the Secretary's] trust acquisition regulations if the United States has not yet acquired title to the property." *Id.* at 964. Because the United States had "already taken title to the" property at issue, the court

concluded "judicial review [wa]s not available." *Id.* In other words, the court concluded "the Administrative Procedure[s] Act c[ould not] waive the United States' sovereign immunity because the [QTA] preclude[d] [the plaintiff organization's] suit to the extent it s[ought] to nullify the trust acquisition." *Id.* at 965.

Finally, the court in *Neighbors* rejected the plaintiff organization's request that the court permanently enjoin the Secretary from proceeding with or authorizing development of the land at issue until such time as the Secretary complied with the requirements of NEPA (i.e., by performing an EA). In the court's view, this request for relief effectively sought to have the "Secretary re-examine the decision to take the property into trust." *Id.* The court concluded, however, that "any claim seeking to re-examine issues unique to the trust acquisition [wa]s moot because the court [wa]s without authority to provide any relief." *Id.* More specifically, the court stated:

> Assuming for the sake of argument the district court considered the merits of [the plaintiff organization's] various claims and concluded the Secretary had not complied with the National Environmental Policy Act or the trust acquisition regulations, the district court could theoretically order the Secretary to now consider the appropriate factors. The district court, however, has no power to divest the United States of the property and [the plaintiff organization] does not allege the Secretary has power to reconsider its decision. Requiring the Secretary to re-examine its trust acquisition decision would not provide [the plaintiff organization] with any meaningful relief and would be a waste of agency resources – not to mention the judicial resources that would be consumed in evaluating the sufficiency of the

> Secretary's initial considerations. Since the Secretary has acquired title to the property, the issue is moot.

Id.

The impact of *Neighbors* on the instant appeal is clear. In light of the QTA's Indian trust land exemption, *Neighbors* compels us to conclude that the district court in this case lacked subject matter jurisdiction over the defendants' counterclaim and third-party claim to the extent it sought to challenge the BIA's decision to take the property at issue into trust for the Band. Thus, the district court erred (in its August 11, 2000 order) in reviewing the trust acquisition and in turn concluding that the BIA acted arbitrarily and capriciously by failing to conduct a pre-acquisition EA. The district court also erred (again in its August 11, 2000 order) in directing the BIA to conduct a post-acquisition EA and in suggesting that the effect of its order was to "invalidate the agency's decision to take the land in trust until the BIA complied with the procedural requirements of NEPA." App. at 60. As made clear in *Neighbors*, the district court clearly lacked the "power to divest the United States of the property. . . ." 379 F.3d at 965. Notably, the district court ultimately concluded (in its February 6, 2002 order), and correctly so in light of *Neighbors*, that the Indian lands exemption in the QTA rendered the government immune from questions to the title to the land at issue.

In their appellate reply brief, defendants attempt to distinguish *Neighbors* on several grounds. First, defendants assert that the QTA's Indian land exemption does not bar "judicial review of final agency action pursuant to § 704 of the" Administrative Procedures Act. Aplt. Reply Br. at 5. This assertion, however, is directly undercut by

the decision in *Neighbors*. Indeed, as outlined above, the court in *Neighbors* expressly held that the Administrative Procedures Act "cannot waive the United States' sovereign immunity because the [QTA] precludes [a] suit to the extent it seek[s] to nullify [a] trust acquisition."[5] 379 F.3d at 965.

Second, defendants assert that the instant case is distinguishable from *Neighbors* because the BIA "shield[ed] this project from known opposition. . . ." Aplt. Reply Br. at 5. In particular, defendants complain that the BIA gave notice of the proposed acquisition only to the City and not to the State of Utah. *Id.* Further, defendants complain that "[t]he City did not receive enough information to put it on notice that its outdoor advertising interests were at stake. . . ." *Id.* We disagree. To begin with, we note that the then-applicable federal regulations did not require notice to either the City or the State at the time the BIA was considering whether to accept the parcels at issue into trust for the Band. Further, notwithstanding the lack of any notification requirement, the record establishes that the BIA gave both oral and written notice to the City of the proposed acquisition. Lastly, we note that although the City allegedly raised concerns about outdoor advertising at the time it was given oral notice by the BIA of the project, the City thereafter remained silent, even after receiving written notice from the BIA regarding the proposed acquisition.

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[5] To the extent defendants cite decisions from the Eighth, Ninth, and Eleventh Circuits allegedly supporting their assertion, those cases are clearly contrary to *Neighbors* and thus are not controlling here.

Third, defendants argue that in *Neighbors*, "both the Interior Board of Indian Appeals and the District Court . . . examined the merits of whether the Secretary followed the applicable laws" in taking the property at issue into trust. Aplt. Reply Br. at 6. In contrast, defendants argue, "the procedural transgressions [in this case] have never been reviewed on the merits." *Id.* There are [at] least two flaws in this reasoning. First, although the City was given notice of the proposed acquisition, it failed to challenge the acquisition either prior to or following the BIA's approval of the acquisition. Thus, the fact that there was no review of the BIA's decision by the Interior Board of Indian Appeals rests directly on the City's shoulders. Second, the decision in *Neighbors* makes clear that the district court in that case lacked subject matter jurisdiction to review the trust acquisition. Thus, even though the district court in that case may have purported to "examine the merits of whether the Secretary followed the applicable laws" in taking the property at issue into trust, it clearly lacked authority to do so. In turn, then, defendants in this case cannot complain that they were wrongfully deprived of district court review of the acquisition.

Finally, defendants argue that, if nothing else, the decision in *Neighbors* should be reconsidered because it misinterpreted, and indeed is contrary to, an earlier decision of this court, *McAlpine v. United States*, 112 F.3d 1429 (10th Cir. 1997). In *McAlpine*, an individual member of the Osage Tribe purchased two parcels of land in south-eastern Kansas and then requested that the Secretary of the DOI take the land into trust under § 465 of the IRA. When the Secretary declined to do so, the tribal member first exhausted his administrative remedies and then filed suit in federal court seeking to compel the Secretary to

accept his land in trust status. The district court dismissed the case for lack of subject matter jurisdiction, ruling that the Secretary's decision was a non-reviewable discretionary act. Alternatively, the district court concluded that the Secretary's decision was not subject to reversal because the Secretary had reviewed the relevant regulatory factors. On appeal, this court rejected the district court's ruling that the Secretary's decision was a non-reviewable discretionary act, and instead concluded that the Secretary's decision was reviewable under the APA. *Id.* at 1435.

We conclude that *Neighbors* is neither contrary to, nor requires a reexamination of, the decision in *McAlpine*. In this regard, we note that in *Neighbors*, this court expressly distinguished *McAlpine*. In particular, the court in *Neighbors* noted that the QTA "was not in play in *McAlpine* because the Secretary had not taken the title in trust." 379 F.3d at 963. "Further," the court noted, "Mr. McAlpine was not seeking to divest the United States of its title in any Indian trust land." *Id.* Obviously, we are bound by the decision in *Neighbors*, absent *en banc* reconsideration or a supervening contrary decision by the Supreme Court.

Was the EA conducted in good faith?

Defendants contend that the final EA conducted by the BIA pursuant to the district court's August 11, 2000 order was inadequate and not completed in good faith because it was conducted after the land at issue had been acquired in trust and the leases executed and approved. According to defendants, the district court should have

directed the BIA to "invalidate the approval of the five leases as well as the trust acquisition." Aplt. Br. at 19.

We conclude this issue is moot. As discussed above, the district court lacked subject matter jurisdiction over defendants' counterclaims and third-party claims to the extent they sought to overturn the trust acquisition. In turn, the district court lacked authority to direct the BIA to conduct a post-acquisition EA reviewing the environmental effects of the acquisition. Finally, even assuming, for purposes of argument, that the EA conducted by the BIA at the behest of the district court was somehow inadequate, it is immaterial because there is no basis for reversing the trust acquisition.

Applicability of Highway Beautification Act

The final portion of the district court proceedings focused on the question of whether, assuming the validity of the trust acquisition and leases, the defendants nevertheless had the right to impose restrictions on the placement of the billboards on the land at issue. The parties filed cross motions for summary judgment on this issue. In an order dated October 22, 2003, the district court granted summary judgment in favor of the plaintiffs. App. at 73. In doing so, the district court first concluded that the property at issue constituted "Indian country," as that term is defined in 18 U.S.C. § 1151 (as noted by the district court, this statute governs the applicability of federal criminal laws, but has also been held to apply to questions of civil jurisdiction). The district court then rejected defendants' assertion "that Congress ha[d] explicitly authorized the imposition of Utah's and St. George's regulatory laws over the subject property through . . . the Highway Beautification

Act of 1966 [HBA]. . . ." *Id.* at 78. More specifically, the district court "conclude[d] that even if the HBA applie[d] to the trust land at issue here," it was "subject to federal (not state) enforcement, and the [HBA] d[id] not expressly authorize the regulation intended by Utah and St. George." *Id.* at 79. Based upon these conclusions (as well as others not relevant here), the district court held "that the State Defendants ha[d] no authority, express or implied, to regulate Kunz's placement of billboards on the subject property, held in trust for the" Band. *Id.* at 87. Accordingly, the district court denied the defendants' motion for summary judgment and granted the plaintiffs' cross-motion for summary judgment. *Id.*

Defendants challenge the district court's ruling on appeal, arguing that (1) the HBA is a general regulatory scheme applicable to Indian lands and thus the BIA has an obligation to enforce the HBA against Kunz, and (2) the State (via the Utah State Department of Transportation) has authority to enforce the HBA's limitations against Kunz. We review de novo the district court's grant of summary judgment. *See Croy v. Cobe Lab., Inc.*, 345 F.3d 1199, 1201 (10th Cir. 2003). Likewise, we review de novo the district court's interpretation of a federal statute, in this instance the HBA. *See Schusterman v. United States*, 63 F.3d 986, 989 (10th Cir. 1995).

a) Overview of the HBA

The HBA regulates outdoor advertising, including billboards, on or near interstate highways. It begins by declaring Congress' intent regarding the control of outdoor advertising:

> The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

23 U.S.C. § 131(a).

Because the majority of land adjacent to the interstate highway system is non-federal, the HBA creates financial incentives for the States to "ma[k]e provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising. . . ." 23 U.S.C. § 131(b). In particular, if a State does not make such provision, the HBA directs that the federal-aid highway funds apportioned to that State "shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State . . . until such time as such State shall provide for such effective control." *Id.*

The HBA outlines, in some detail, how "effective control" of outdoor advertising is to be maintained. 23 U.S.C. § 131(c). Generally speaking, outdoor advertising displays on land "outside of urban areas, visible from the main traveled way of the [interstate highway] system, and erected with the purpose of their message being read from such main traveled way," are strictly limited to "directional and official signs and notices" and must "conform to national standards . . . concerning lighting, size, number, and spacing of signs. . . ." *Id.* Greater flexibility is allowed for outdoor advertising displays that are erected "within areas adjacent to the interstate and primary systems

which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and" the federal government. 23 U.S.C. § 131(d). As noted by the federal appellees, "[t]he HBA contemplates that states will achieve compliance with [these] national standards through zoning, eminent domain, and direct regulation of land use under state law." Fed. Aplee. Br. at 46. Consistent with this notion, the HBA does not prohibit States from regulating in the area of outdoor advertising. To the contrary, it permits States to "establish[ ] standards imposing stricter limitations with respect to" outdoor advertising displays than are otherwise established in the HBA. 23 U.S.C. § 131(k).

In addition to these provisions, the HBA contains a separate provision regarding federal land:

> All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

23 U.S.C. § 131(h). Aside from this provision, no other mention is made in the HBA of federal land in general, or of land held by the federal government in trust for an Indian tribe.

b) Obligation of the BIA to enforce the HBA

Defendants first argue that the HBA, by its express language, applies to the land at issue and that the BIA "clearly had a responsibility," at least during the process of approving the trust acquisition and the leases, "to see that

the HBA was enforced." Aplt. Br. at 43. In turn, defendants argue that the billboards erected on the land "cannot meet th[e] standards" of the HBA "unless they are moved." *Id.*

A review of the record on appeal establishes that defendants did not raise this argument below. In particular, defendants' third-party claim contains no mention of the BIA having an obligation to enforce the HBA. Rather, the defendants' third-party claim speaks simply in terms of Kunz's signs failing to meet the HBA standards and the State having a right to enforce the HBA against Kunz and the Band. *See* Fed. Aplee. Supp. App. at 23-25, 34. Similarly, there is no indication in the record that the defendants ever sought to amend their third-party claim to assert an obligation on the part of the BIA to enforce the HBA. For example, although the appendix does not include any of the summary judgment pleadings filed by the parties below, the district court's order granting summary judgment in favor of the plaintiffs contains no mention of the argument now asserted by defendants. Thus, we conclude the issue has been waived by defendants. *See Cummings v. Norton*, 393 F.3d 1186, 1190 (10th Cir. 2005) (noting "the general rule that issues not raised below are waived on appeal.").

[c]) Whether the State of Utah has the right to regulate the billboards

Defendants contend that, even in the absence of federal enforcement, the State of Utah "has the authority to restrict the placement of billboards on the subject property by the non-Indian lessee." Aplt. Br. at 46. More specifically, defendants argue that the State's authority in this regard arises from either (1) the HBA's express delegation of authority to

the State to enforce the limitations contained therein, or (2) the State's own police power. *Id.*

1) Express delegation of authority?

Defendants assert that the HBA expressly authorizes the State to regulate outdoor advertising displays on the land at issue. As they did below, defendants first cite to 28 U.S.C. § 131(h), which, as noted above, purports to make the HBA applicable to "[a]ll public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system. . . ." We agree with the district court, however, that even assuming § 131(h) makes the HBA applicable to land held in trust by the United States for an Indian tribe, nothing therein can be read as authorizing state enforcement of the HBA on such trust land. Rather, we agree with the district court and the Supreme Court of California that such enforcement would be reserved for the federal government. *See People ex rel. Dep't of Transp. v. Naegele Outdoor Adver. Co.*, 698 P.2d 150, 156 (Cal. 1985) (concluding the HBA contains no clear and unambiguous mandate providing for state enforcement, and further concluding that, had Congress intended for states to enforce the HBA on Indian tribal lands, "it would have empowered the relevant state authorities to condemn reservation lands, to regulate tribal land use, and to sue Indian tribes.").

In a Rule 28(j) letter filed shortly before oral arguments in this case, and again during oral arguments, defendants cited to an additional provision of the HBA, 28 U.S.C. § 131(j), which they assert also expressly

authorizes state enforcement of the HBA on trust land.[6] In light of the fact that § 131(j) was in existence at the time of the district court proceedings, yet was not cited by defendants until their Rule 28(j) letter, we find it unnecessary to address the meaning of the provision and its possible impact on state enforcement of the HBA on trust land. *See Shawnee Tribe v. United States*, 405 F.3d 1121, 1128 n.6 (10th Cir. 2005) ("a 28(j) letter is not the proper mechanism to address a new argument."); *United States v. Kimler*, 335 F.3d 1132, 1138, n.6 (10th Cir. 2003) ("We will not address issues not raised in the appellant's opening brief, especially where the arguments are based on authority that was readily available at the time of briefing.").

2) The State's police power

Defendants alternatively argue that, even absent express authorization from the HBA, the State of Utah can, "acting under its own police power, . . . restrict the unlawful placement of billboards by Kunz." Aplt. Br. at 46.

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[6] Section 131(r)(2) provides as follows:

Removal of illegal signs. –

(1) **By owners.** – Any sign, display, or device along the Interstate System or the Federal-aid primary system which was not lawfully erected, shall be removed by the owner of such sign, display, or device not later than the 90th day following the effective date of this subsection.

(2) **By States.** – If any owner does not remove a sign, display, or device in accordance with paragraph (1), the State within the borders of which the sign, display, or device is located shall remove the sign, display, or device. The owner of the removed sign, display, or device shall be liable to the State for the costs of such removal. Effective control under this section includes compliance with the first sentence of this paragraph.

23 U.S.C. § 131(r).

In addressing this same argument below, the district court first concluded that the land at issue constituted "Indian country," as defined in 18 U.S.C. § 1151. App. at 75-78. Notably, defendants do not challenge this conclusion on appeal. Thus, we proceed from the assumption that the land at issue constitutes "Indian country."[7]

A state may exercise its authority over activities of non-tribal members on "Indian country" only "under certain circumstances. . . ." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 (1983). Whether the erection and maintenance of billboards constitutes such a circumstance requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* at 333. "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Id.* at 334. This "inquiry is to proceed in light of traditional notions of Indian

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[7] Although the jurisdictional importance of "Indian country" originated in federal criminal statutes and other specific statutory contexts, the Supreme Court now considers "the Indian country classification [to be] the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands." *Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 973 (10th Cir. 1987); *cf. Blunk v. Arizona Dept. of Transp.*, 177 F.3d 879, 883-84 (9th Cir. 1999) (concluding that the Arizona Department of Transportation had authority to regulate billboards on non-reservation fee land because that land did not constitute "Indian country").

As noted, defendants have not challenged on appeal the district court's conclusion that the land at issue qualifies as "Indian country." Even if that issue had been raised, we would likely agree with the district's conclusion, given our decision in *Roberts*, where we held that a tribal complex owned by United States in trust for an Indian nation was "Indian Country" for purposes of Major Crimes Act, even though it was not formally declared a reservation. 185 F.3d at 1131.

sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (quoting *Mescalero*, 462 U.S. at 334-35).

The district court concluded, and we agree, that there are significant federal interests at play here. To begin with, the BIA has accepted the subject property into trust on behalf of the Band and expressly approved the leases of the land from the Band to Kunz. Further, the BIA has now conducted two EA's in connection with these transactions and has concluded that the erection and maintenance of the billboards will not have a significant environmental impact. Lastly, as noted by the district court, the BIA has adopted the following general policy regarding the applicability of state and local law to trust land, such as the parcels at issue:

> [N]one of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

25 C.F.R. § 1.4(a).[8]

[8] Although there are express exceptions to this policy, none of them are applicable in this case. *See* 25 C.F.R. § 1.4(b) (outlining exceptions).

The Band's interests in the land are even more significant. Although defendants argue that the Band will derive little economic benefit from the parcels and the leases, a review of the record establishes otherwise. Prior to the acquisition and leases of the parcels at issue, the Band had only "three sources of income. . . ." App. at 200. These included (1) "a sand and gravel lease," (2) "a mining lease," and (3) "a grazing lease. . . ." *Id.* at 201. Notably, the income from these three sources was not "adequate . . . to properly operate functions of, or provide economic development for, the Band." *Id.* In early 2003, the sand and gravel lease ceased to be a source of income for the Band. *Id.* As a result, the Band's income from the leases of the parcels at issue now constitutes its greatest source of revenue. *Id.* at 201, 221. As noted in the March 2003 EA, the leases of the parcels at issue are "anticipated to have a beneficial effect on social and economic conditions of the Band by providing a long-term revenue resource and by helping to establish economic revenue for future economic development initiatives." *Id.* at 222. In addition to the revenue stream from the leases, it is uncontroverted that the Band owns the parcels at issue and, at the end of the billboard lease terms, will be free to "use the subject property as they wish." *Id.* at 83. As the district court noted, the "land in the I-15 corridor is . . . developing rapidly," thus suggesting that "ownership of the subject property will clearly be beneficial to the" Band. *Id.* Finally, and relatedly, there is some indication in the record that the Band intends to ultimately develop the parcels for housing by Band members, the majority of whom, at the present, are forced to live off-reservation due to lack of housing, resources, and employment opportunities. *Id.* at 133; *see* Supp. App. at 4.

In contrast, the State has failed, in our view, to establish that its interests in regulating the land are substantial. It is uncontroverted that, in attempting to comply with the HBA, the State passed its own law, the Utah Outdoor Advertising Act. *See* Utah Code Ann. § 72-7-501, et seq. Notably, the provisions of that Act are virtually identical to those set forth in the HBA, and thus there appears to be no unique state interest in regulating the billboards. Indeed, the State admits in its opening appellate brief that it is "regulating consistently with federal policy." Aplt. Br. at 49. Although the State suggests that its failure to regulate the billboards might result in the federal government penalizing it under the HBA by withholding federal highway funds, there is simply no evidence in the record suggesting that this is a legitimate threat, particularly given the fact that the federal government has expressly authorized the billboards at issue.

The State also suggests that the area in which the billboards are located has "unique scenic value," and that the billboards have "caused" "visual pollution. . . ." Aplt. Br. at 53. However, the district court found that the area in which the billboards are located "is already significantly developed," thereby undercutting the State's "visual pollution" argument. App. at 85. Importantly, the State has not challenged this finding on appeal.

Lastly, the State complains that if it is precluded from regulating the land at issue, the Band will effectively have been allowed to "market an exemption" from State regulation. Such a result, the State argues, will "encourage [] third parties to take advantage of the protected status of Indians." Aplt. Br. at 51. In support of its argument, the States points to *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), in which

the Supreme Court upheld state taxes applied to on-reservation retail sales by non-Indians of cigarettes and tobacco products. In reaching this conclusion, the Court stated: "[w]e do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* at 155.

Two factors distinguish the instant case from *Colville*. First, unlike the situation in *Colville*, the Band in this case has not marketed an exemption from state taxation. "Thus, a central component to the reasoning of *Colville* is inapplicable here." *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 985 (10th Cir. 2004). Second, unlike the tribe in *Colville*, the record in this case clearly establishes that the Band has a significant economic interest in the land at issue and the billboard advertising that is occurring thereon. Not only are the billboard leases providing the Band with a significant portion of its current revenue, the record on appeal establishes that the land is an important asset for the Band in terms of future economic development.

In sum, balancing the federal, tribal, and State interests against one another leads us to conclude that allowing the State to exercise control over the land at issue would "threaten Congress' overriding objective of encouraging tribal self-government and economic development." *Mescalero*, 462 U.S. at 341. Thus, we agree with the district court that the State cannot exercise its police power to regulate the land at issue.

The judgment of the district court is AFFIRMED. Appellees' Motion to Strike Appellants' Notice of Supplemental Authority is DENIED.

03-4274, *Shivwits Band of Paiute Indians v. Utah*

LUCERO, Circuit Judge, concurring.

I join in the opinion of my esteemed majority colleagues, but write separately to provide what I consider to be a missing step in the analysis. Without deciding whether the Highway Beautification Act ("HBA") applies to Indian lands, the majority concludes that if the HBA does apply to Indian lands, it is subject to federal, not state, enforcement. The problem with this reasoning is that if the HBA does not apply to Indian lands, any remaining discussion would be unnecessary. Thus, it does not appear that this is an appropriate case upon which to proceed by rhetorical assumption. The parties have directly presented and briefed the question of HBA application to Indian lands, and it is my considered judgment that we must first address that question directly. Only having decided this issue may we properly proceed to the conclusion that the state may not enforce HBA regulations on Indian lands.

We consider the question of whether the HBA applies to Indian lands under the shadow of *Federal Power Commission v. Tuscarora*, which states that "a general statute in terms applying to all persons includes Indians and their property interests." 362 U.S. 99, 116 (1960). This broad statement was not essential to *Tuscarora's* narrow holding, as the statute in question specifically addressed its application on Indian lands. *Id.* at 112. A subsequent Supreme

Court case did not apply *Tuscarora*. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (holding that a federal statute governing oil and gas leases did not bar a tribe's power to tax and stating that "'a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent'") (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978)). At least three circuits have interpreted the Court's statements in *Merrion* to limit the broad *Tuscarora* principle. *See Donovan v. Navajo Forest Products Industries*, 692 F.2d 709, 713 (10th Cir. 1982); *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989); *United States v. Farris*, 624 F.2d 890, 893-894 (9th Cir. 1980).

Reconciling the Court's varying statements in *Merrion*, *Santa Clara Pueblo*, and *Tuscarora*, this circuit and others have acknowledged three exceptions to *Tuscarora's* rule that federal statutes of general applicability apply to Indian lands. These exceptions, pronounced in *Nero v. Cherokee Nation of Oklahoma*, are applied if "(1) the law touches 'exclusive rights of self-governance in purely intramural-matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.'" 892 F.2d 1457, 1462-63 (10th Cir. 1989) (refusing to find that civil rights law created a cause of action against a tribe) (quoting *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985)); *see also EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989) (refusing to apply Age Discrimination in Employment Act because it abrogated specific treaty rights); *NLRB v. Pueblo of San Juan*, 280 F.3d

1278, 1283-84 (10th Cir. 2000) (refusing to apply section of National Labor Relations Act because doing so would abrogate tribe's right of self-government).

None of the three *Nero* exceptions apply in this case. First, the appellees do not allege that application of the Highway Beautification Act would abrogate the tribe's treaty rights. Second, they do not argue that the HBA touches the tribe's rights of self-governance in purely intramural matters. Third, the history of the statute does not suggest that Congress intended to exclude Indian lands from advertising restrictions.

Because petitioners do not establish any of the *Nero* exceptions, the *Tuscarora* general principle of applicability controls and compels the conclusion that the HBA does apply to Indian lands. I note that the Interior Board of Indian Affairs came to the opposite conclusion when addressing this question in 1979. *Morongo Band of Mission Indians v. Sacramento Area Office*, 7 IBIA 299, 1979 WL 21375 (1979). The Board's conclusion, however, turned on its finding that the term "reservation" in § 131(h) of the HBA is ambiguous, a conclusion I do not find plausible based on the plain language of the act. *See United States v. Portneuf-Marsh Valley Irr. Co.*, 13 Fed. 601, 604 (9th Cir. 1914) (holding "reservations" includes Indian reservations).

Determining that the HBA does apply to Indian lands does not answer the question as to whether enforcement of the statute is a state or federal function. Again, I agree with my colleagues that this is a federal and not a state function but write to amplify the analysis to include consideration of the statute's language.

Section 131(h) of the HBA states that the relevant lands "shall be controlled *in accordance with* the provisions of this section." 23 U.S.C. § 131(h) (emphasis added). The use of the phrase "in accordance with" suggests that the remainder of the section provides the substantive standard to be applied. It does not determine the party intended to enforce those standards. Had Congress stated that such lands should be controlled "by" the provisions of this section, perhaps the statute could be read to suggest delegation to the states to enforce HBA regulations on federal lands. However, the language "in accordance with" leaves the question of enforcement unanswered.

Because § 131(h) does not address the question of enforcement, we are guided by general presumptions regarding the application of regulations on Indian lands. There is a presumption against state jurisdiction on Indian lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987). Indian tribes "retain 'attributes of sovereignty over both their members and their territory.'" *Id.* at 207 (quoting *United States v. Mazurie*, 419 U.S. 554, 557 (1975)). Furthermore, "'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the states.'" *Cabazon*, 480 U.S. at 207 (quoting *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980)).

Notwithstanding this presumption, states are permitted to enforce regulations when Congress explicitly delegates authority to do so. *Cabazon*, 480 U.S. at 215. The HBA includes no such delegation. The HBA is enforced through zoning and the power of eminent domain. 23 U.S.C. § 131(c), (g), (r). There is no indication that the HBA delegated to the states the right to use these powers on Indian lands. *See People ex rel. Dep't of Transp. v.*

Naegele Outdoor Adver. Co., 698 P.2d 150, 156 (Cal. 1985); *Morongo Band of Mission Indians v. Sacramento Area Office*, 7 IBIA 299, 1979 WL 21375 (1975). A previous version of the statute, on the other hand, provided for enforcement by the federal agency with jurisdiction over the public lands in question. Section 131(d) of the 1958 Highway Act, the precursor to the HBA, dealt directly with the enforcement of outdoor advertising regulations on public lands. That section stated:

> Whenever any portion of the Interstate System is located upon or adjacent to any public lands or reservations of the United States, the Secretary of Commerce may make such arrangements and enter into such agreements with the agency having jurisdiction over such lands or reservations as may be necessary to carry out the national policy set forth in subsection (a).

72 Stats. 885, § 131(d), (1958). When the HBA was passed in 1965, section 131(d) was repealed and replaced by the current § 131(h). The House Report published when the HBA was passed states:

> This section simply extends to all public lands and reservations of the United States which are adjacent to any portion of the Interstate System or the primary system the same controls covering other roads which are subject to this legislation.

H.R.Rep. No. 89-1084, at 3710-3736 (1965). The California Supreme Court has interpreted this history to suggest that Congress intended the same means of enforcement to apply in the 1965 act as had applied in the 1958 act. *Naegele*, 698 P.2d at 155. Given the presumption against state enforcement, and the fact that a prior version of the statute provided for enforcement by the agency with

jurisdiction over the public lands in question, I conclude that § 131(h) requires enforcement not by the state but by the BIA.

On my independent review of the record, I also agree with the majority that the state did not argue below that the BIA had an obligation to enforce the HBA. Had the state presented this argument to the district court, I may well have reached a different conclusion than the one I come to today. Appellants having failed to do so, I agree that affirmance is appropriate.

APPENDIX B

IN THE UNITED STATES COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SHIVWITS BAND OF PAIUTE INDIANS and KUNZ & COMPANY, d/b/a KUNZ OUTDOOR ADVERTISING, a California Corporation, Plaintiffs and Counterclaim Defendants, vs. STATE OF UTAH, UTAH STATE DEPARTMENT OF TRANSPORTATION, and ST. GEORGE CITY, a Utah Municipal Corporation, Defendants and Counter-claimants and Third-Party Plaintiffs, vs. BRUCE BABBITT, in his capacity as Secretary of the United States Department of the Interior; ADA DEER, in her capacity as Assistant Secretary of Indian Affairs; WALTER R. MILLS, in his capacity as Area Director of the Bureau of Indian Affairs; and the BUREAU OF INDIAN AFFAIRS, Third-Party Defendants.	ORDER (Filed Oct. 22, 2003) Case No. 2:95CV1025TC

This case is before the court on the parties' cross motions for summary judgment. The factual and procedural background has been set forth in the parties' pleadings and in other orders of the court and will be repeated here when necessary to explain the decision. The issue for resolution is whether the Defendants (The State of Utah, the Utah State Department of Transportation, and the City of St. George, Utah, (collectively referred to as "the State Defendants")) have the authority to impose restrictions on the placement of billboards on land owned by the United States in trust for the Shivwits Band of Paiute Indians ("the Shivwits") and which is being used by a non-Indian sign company for billboard display. For the reasons explained below, the court concludes that the State Defendants do not have that authority.

ANALYSIS

I. Legal Standard

Under Federal Rule of Civil Procedure 56, a court may enter summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998).

II. Discussion

The question of whether the State Defendants have the authority to regulate the placement of billboards on the subject property raises issues of tribal sovereignty and

federal preemption. There is a recognized presumption against state jurisdiction in Indian country. *Indian Country, U.S.A., Inc. v. Okla. Tax Comm'n*, 829 F.2d 967, 976 (10th Cir. 1987) (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)); *see also, Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 666 (9th Cir. 1975) (when Congress "authorized the Secretary to purchase and hold title to lands for the purpose of providing land for Indians, it understood and intended such lands to be held . . . free of state regulation."). Even so, "the Court also has recognized that state laws may reach into Indian country 'if Congress has expressly so provided.'" *Indian Country*, 829 F.2d at 976 (citing *Cabazon*, 480 U.S. at 207). Additionally, "a state may validly assert such jurisdiction even absent express consent in very limited circumstances." *Id.* (citing *Cabazon*, 480 U.S. at 215).

(A) Is the Subject Property "Indian Country"?

The threshold issue is whether the subject property is "Indian Country." The State Defendants argue that the subject property is not Indian country and therefore, they are free to impose state and local laws. *See Narragansett Indian Tribe of Rhode Island v. Narragansett Elec.* Co., 89 F.3d 908, 915 (1st Cir. 1996) (concluding that if the subject property is not Indian Country, there is no bar to the exercise of the State's jurisdiction.) The statute defining the term "Indian country" provides that

> [e]xcept as otherwise provided in sections 1154 and 1156[1] of this Title, the term "Indian country"

[1] Both sections are inapplicable to the issues in this case.

> as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of the state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of way running through the same.

18 U.S.C. § 1151 (2003). This statute governs the applicability of federal criminal laws, but it has also been held to apply to questions of civil jurisdiction. *See Alaska v. Native Vill. of Venetic Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian Tribe inhabiting it, and not with the States"); *DeCoteau v. District Country Court*, 420 U.S. 425, 428 n.2 (1975) (Section 1151 generally applies to questions of civil jurisdiction); *Indian Country*, 829 F.2d at 973 ("the Indian country classification [is] the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands.").

The Tenth Circuit has held that "[t]o qualify as Indian country, [the land at issue] must satisfy one of the tests of 18 U.S.C. § 1151." *HRI, Inc. v. Envt'l Prot. Agency*, 198 F.3d 1224, 1250 (10th Cir. 2000) (citing *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996)). The State argues that the subject property does not qualify as Indian Country under any of the three definitions provided by 18 U.S.C. § 1151. Although the subject property is

clearly neither (a) on a reservation nor (c) an allotment,[2] the question is whether it qualifies as a dependent Indian community.

> The Supreme Court has narrowly defined "dependent Indian communities:"
>
> We now hold that [the term "dependent Indian communities"] refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements – first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence.

Venetie, 522 U.S. at 527. The Tenth Circuit has addressed this issue following *Venetie*, reaching the clear and unambiguous conclusion that "lands owned by the federal government in trust for Indian tribes are Indian Country pursuant to 18 U.S.C. §1151." *U.S. v Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999); *see also Oklahoma Tax Comm'n v. Citizen Band Potwatomi* [sic] *Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991) (test for determining whether land is Indian country depends not on formal "trust" or "reservation" status, but rather on "whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.'"); *HRI, Inc.*, 198 F.3d at 1249 (holding trust lands are Indian country under Supreme Court and Tenth Circuit precedent). Based on the *Venetie* decision, the *Roberts* Court

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[2] Under the relevant law, an allotment is a parcel of land created out of a diminished Indian reservation and held in trust by the Federal Government for the benefit of individual Indians. *See United States v. Pelican*, 232 U.S. 442, 449 (1914).

determined that a trust land designation itself satisfies both federal set aside and superintendence requirements. 185 F.3d at 1132-33.

At the conclusion of its NEPA process, the Bureau of Indian Affairs ("the BIA") issued a Finding of "No Significant Impact" and stated that it would not seek to remove the land from trust status nor deny approval of the five billboard leases. Accordingly, as it now stands, the subject land is held in trust, and is clearly "Indian Country" under 18 U.S.C. § 1151.

(B) Has Congress Expressly Consented to Local and State Regulation over the Subject Property?

The State Defendants contend that Congress has explicitly authorized the imposition of Utah's and St. George's regulatory laws over the subject property through two federal statutes: (1) the Highway Beautification Act of 1966, and (2) Public Law 280.

1. Highway Beautification Act of 1966

The State argues that Congress expressly authorized imposition of state and local regulation regarding placement of billboards through the federal Highway Beautification Act of 1966 ("HBA"), 23 U.S.C. § 131 (2003). The HBA provides that

> the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

23 U.S.C. § 131(a). Central to the State Defendants' argument is the provision of the HBA that "[all public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary." 23 U.S.C. § 131(h). There is little case law on this issue. Significantly, the State Defendants cite no case law to support their argument. The Shivwits rely primarily on the decision of the California Supreme Court in *People ex rel. Dep't of Transp. v. Neagele* [sic] *Outdoor Adver.*, 698 P.2d 150, 155-58 (Cal. 1985). In *Naegele*, the State of California sought to regulate sixteen billboards on land held in trust for the Morongo Band of Mission Indians. *Id.* at 151-53. California cited its Outdoor Advertising Act (the statute by which California complies with the HBA) as authority for its exercise of jurisdiction. *Id.* at 153. The California Supreme Court held that the HBA did not authorize state jurisdiction over Indian trust land, and indeed that the HBA "reserved to federal authorities the responsibility for enforcing the act's provisions upon federal lands and reservations." *Id.* at 158. Like the *Naegele* Court, this court concludes that even if the HBA applies to the trust land at issue here, the Act is subject to federal (not state) enforcement, and the Act does not expressly authorize the regulation intended by Utah and St. George.

2. Public Law 280

The State Defendants point to Public Law 280 (codified in relevant part at 28 U.S.C. §1360 (2003) as an express grant from Congress to regulate the subject property. Under Public Law 280, state laws of "general

application' are extended into Indian Country, to be applied with "the same force and effect . . . as they have elsewhere within the State." 28 U.S.C. § 1360(a). The United States Supreme Court has made clear that the relevant portion of Public Law 280 grants a state "jurisdiction over private civil litigation involving reservation Indians in state court," but not general civil regulatory authority.[3] *Bryan v. Itasca County*, 426 U.S. 373, 384-85 (1976) (holding that Public Law 280 does not authorize state and local governments to apply their regulatory laws to Indian reservations); *see also Cabazon*, 480 U.S. at 208 (citing *Bryan* for the proposition that Public Law 280 jurisdiction does not confer general civil regulatory authority). Under this rule, Public Law 280 does not provide Utah and St. George with the authority to regulate the billboards on the subject property.

[(C)] Even in the Absence of Express Congressional Consent, May the State Defendants Impose Regulations?

Even though the court has concluded that Congress did not expressly permit state or local regulation of the subject property, this does not end the analysis. Even in the absence of express Congressional permission, there are certain circumstances that permit a state to assert authority in Indian country. *Cabazon*, 480 U.S. at 215 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983)). Jurisdiction under such circumstances "remains the exception and not the rule," *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 148 n.41 (1996).

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[3] There is no dispute that the regulations at issue here are regulatory/civil and not criminal.

The Court explained in *Cabazon* that resolution of this question

> turns on whether the state authority is pre-empted by the operation of federal law; and "[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.

Cabazon, 480 U.S. at 216 (*citing Mescalero*, 462 U.S. at 333-35).

A key factor in this analysis is that the federal government has expressly authorized this transaction, thereby showing a federal interest in the transaction. First, the BIA accepted the subject property in trust. Second, the leases to Kunz were expressly approved by the Department of the Interior in accordance with 25 U.S.C. § 415. Third, the BIA has conducted two Environmental Assessments ("EA") in connection with the transaction. *See* Shivwits Band Fee-to-Trust Land Transfer and Outdoor Advertising Leases, Final Environmental Assessment, at 1-3 (BIA March 2003) ("March 2003 EA," attached to Plaintiffs' and Federal Defendants' Cross-Motion as Ex. 9). The first EA, in 1995, assessed the environmental impacts of leasing the subject property to Kunz. The conclusion was that there was "No Significant Impact" resulting from the lease transaction. (1995 EA, attached as App. A to March 2003 EA). Following the

March 2003 EA, the BIA reaffirmed its decision to take the subject property into trust and to approve the lease to Kunz. (March 2003 EA.)

25 C.F.R. § 1.4 (2003) provides additional support for the argument that the State Defendants do not have authority to regulate the subject property. It reads that, barring an exception not relevant to this case,

> none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property . . . shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States.

25 C.F.R. § 1.4(a). The State Defendants challenge the authority of this seemingly clear rule, arguing that the regulation was promulgated by the Secretary of the Interior without statutory authority.[4] In support of this challenge, the State Defendants cite scholarly commentary and a district court case within the Tenth Circuit, *Norvelle v. Sangre de Cristo Dev. Co., Inc.*, 372 F. Supp. 348 (D.N.M. 1974), *rev'd on other grounds*, 519 F.2d 370 (10th Cir. 1975), both of which call into question the authority of Section 1.4. However, this argument (supported by this

[4] The State Defendants further argue that Section 1.4 is inconsistent with, and superseded by, the Highway Beautification Act. However, as discussed above, the State Defendants have not demonstrated that Congress contemplated extension of the Highway Beautification Act into Indian country. Consequently, they have not shown that the HBA and Section 14 [sic] are in actual conflict.

very authority) was specifically rejected in the frequently cited case of *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 665-66 (9th Cir. 1975). The *Santa Rosa* Court held that

> 25 U.S.C. § 465, which authorizes the Secretary to purchase land for the "purpose of providing land for Indians" and to take the title to such lands in trust, when read against the history of Federal policy governing use and control of Indian trust property, is sufficient to sustain [Section 1.4] as it applies to [the subject property in that case], obtained pursuant to § 465.

Id. Following *Santa Rosa*, other courts have recognized the authority of Section 1.4 under 25 U.S.C. § 465. *Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior*, 228 F.3d 82, 85-86 (2d Cir. 2000); *Wyandotte Nation v. City of Kansas City, Kansas*, 200 F. Supp. 2d 1279, 1288 (D. Kan. 2002); *City of Sault Ste. Marie, Mich. v. Andrus*, 532 F. Supp. 157, 166 (D.D.C. 1980); *see also*, *U.S. v. Roberts*, 185 F.3d 1125, 1131-32 (10th Cir. 1999) (quoting *Santa Rosa*, "We are confident that when Congress in 1934 authorized the Secretary to purchase and hold title to lands for the purpose of providing lands for Indians, it understood and intended such lands to be held in the legal manner and condition in which trust lands were held under the applicable court decisions free of state regulation."). Some of these cases have explicitly announced that Section 1.4 generally exempts Indian trust lands from local zoning and regulatory requirements. *Connecticut*, 228 F.3d at 85-86; *Wyandotte*, 200 F. Supp. 2d at 1288.

A final factor in the court's analysis is the Shivwits' economic interest in the lease transactions and the subject property, as compared with the State Defendants'

countervailing interests. This factor is significant in view of Congress' "overriding objective of encouraging tribal self-government and economic development." *Mescalero*, 462 U.S. at 341. The State Defendants claim that the Shivwits have little, if any, economic stake in this affair. They correctly note that it is Kunz, not the Shivwits, who will use the subject land under the five lease agreements. Each lease agreement, it appears, extends for a twenty-year period. (*See, e.g.*, "sample lease," attached as Ex. D. to Compl. at ¶ 4.) For example, one lease requires Kunz to pay the Shivwits $1800 every year for the first fifteen years, then $2,500 per year for the last five years of the lease, for a total gain for the Shivwits of $39,500 for that particular lease. (*Id.* at ¶ 5.) The State Defendants argue that the Shivwits stand to gain, in full, roughly $60,000 from these lease agreements over the twenty-year lease term, as compared to the approximately two million dollars that Kunz stands to gain over the twenty years. According to the State Defendants, this means that it is Kunz, not the Shivwits, who recovers the lion-share of the economic gain from this land use. But in light of evidence showing that the Shivwits' total revenues for the calendar year 1999 came to $90,417, the expected revenues from the lease agreement with Kunz is not insignificant, particularly to the Shivwits. (*See* Affidavit of Band Chairman Glenn Rogers (Rogers Affid.) at ¶4 (attached to Plaintiffs' Cross-Motion as Ex. 6).) It is also highly significant that, as a result of the transaction, the Shivwits own the subject property itself. When the twenty-year lease terms are complete, the Shivwits can use the subject property as they wish. The subject property, amounting to 25.32 total acres, "[is] located adjacent to the east side of I-15 on the south end of the City of St. George, Utah, approximately 1 mile south of the Bloomington exit." (March 2003 EA at

1-1.) Because land in the I-15 corridor is now developing rapidly, ownership of the subject property will clearly be beneficial to the Shivwits. (*See* Rogers Affid. at ¶ 7)

The Shivwits present evidence showing the economic importance of the lease transactions. Band Chairman Glenn Rogers calls the subject land "a very significant asset to the Shivwits Band" and "the best thing the Band has done to raise revenue since Restoration." (Rogers Affid. at 5; *see also* March 2003 EA, at 1-3 ("The Band Council has identified and pursued this opportunity as the best foreseeable opportunity for long-term economic development. No other land was found with a greater potential for economic benefit to Band members. Additionally, the Proposed Action increases the Band's land base.")) Moreover, Mr. Rogers' affidavit describes the Shivwits' ongoing "difficult negotiations over water rights" with the State Defendants who are their opponents in this case. (Rogers Affid. at ¶ 6.) Elaborating on the water rights dispute, Mr. Rogers notes that "[a]ll economic development for the Band has been on hold waiting for us to reach a settlement – except for the I-15 billboard project. Acquiring the I-15 land is the only way we have found to begin any economic development until we obtain water rights on the reservation." (*Id.* at ¶ 6.) The Shivwits are optimistic that various development plans involving land in the area of the subject property will provide the Band itself with "significant development opportunities in addition to outdoor advertising . . . for the Shivwits parcels." (*Id.* at ¶ 7.)

On the other side of the scale, the State Defendants identify their interests as (1) preserving the natural beauty of the area, (2) maintaining a consistent billboard regulatory program throughout the state; (3) enforcing the

HBA in order to qualify for available federal highway funds; and (4) "preserving the right of local units of government to determine where commercial development will occur and to protect other areas from encroachment." (*See* Def's Mem. Supp. Mot. Summ. J. at 21.) Furthermore, the State Defendants argue that "permitting this scheme to proceed risks widespread undermining of the nationwide program of billboard regulation and perhaps other desirable regulatory programs" by encouraging "statute evading transactions" and "zoning defiance." But the court does not find these arguments persuasive for several reasons. First, the subject property is located in an area outside of St. George, Utah, which is already significantly developed. (*See* Rogers Affid. at ¶¶ 9-18 and attached Ex. 1-8.) Second, the State Defendants' argument concerning possible funding cuts by the federal government if the billboards remain is pure speculation. Third, it makes little sense that the federal government will deny the State Defendants federal funds for failing to control land which it has no authority to control. Finally, the State Defendants' "slippery slope" argument that other tribes will try to evade state zoning carries little weight in light of the procedures, including NEPA review (in which the State Defendants would be allowed to participate, through comment and otherwise), that the BIA and the Secretary of the Interior must follow before land can be taken into trust and then leased. In sum, when comparing the interests of the Shivwits and the federal government against those of the State Defendants, particularly in light of notions of Indian sovereign immunity, it is clear that the Shivwits' and the federal interests prevail.

[(D)] Have the Shivwits "Marketed an Exemption?"

The State Defendants' contend that they should be allowed to regulate the subject property because the Shivwits are "marketing an exemption." In *State of Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Supreme Court held that the state could tax on-reservation sales of cigarettes at tribal smoke shops to nonmembers of the tribe who traveled to the shops to purchase those cigarettes. The case stated a rule that federal law prohibits Indian tribes from "market[ing] an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* at 155; *Compare Cabazon*, 480 U.S. at 219-20 (construction and operation of on-reservation gambling did not constitute marketing an exemption).

This issue is closely related to the federal preemption analysis because it involves careful scrutiny of the interests of the Shivwits in this transaction. *See Cabazon*, 480 U.S. at 219-20 (finding that because of the Cabazon and Morongo Bands' substantial economic interest and investment in allowing bingo and poker on their reservations, they were not "marketing an exception.") As discussed, the lease transactions themselves are of vital economic importance to the Shivwits. It is true that the Shivwits did not pay for the land, and that it is Kunz who profits in the main from the use of the land over the twenty-year term of the leases. But it is also true the Shivwits own the land, and will own it in fee simple at the conclusion of the lease terms. As described above, the ownership of this land provides significant economic opportunity to the Shivwits, both for the twenty-year period covered by the leases and (more importantly) when the leases conclude. On this basis, the circumstances here are different from those in

Colville, where it was "painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest." *Colville*, 447 U.S. at 155. Rather, the facts more closely resemble those of *Cabazon*, where "the Cabazon and Morongo are generating value on the reservations through activities in which they have a substantial interest." *Cabazon*, 480 U.S. at 220. Accordingly, the court finds that the Shivwits have not marketed an exemption by obtaining the subject land and leasing it to Kunz.

CONCLUSION

For the reasons set forth above, the court holds that the State Defendants have no authority, express or implied, to regulate Kunz's placement of billboards on the subject property, held in trust for the Shivwits. The State Defendants' Motion for Summary Judgment is DENIED, and the Shivwits' and Federal Defendants' Cross-Motion for Summary Judgment is GRANTED.

SO ORDERED this 22 day of October, 2003.

BY THE COURT:

/s/ Tena Campbell
TENA CAMPBELL
United States District Judge

United States District Court

Central Division for the District of Utah

Shivwits Band of Paiute Indians, et al.

v.

State of Utah, et al.

JUDGMENT IN A CIVIL CASE

(Filed Oct. 22, 2003)

Case Number: 2:95cv1025TC

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment be granted in favor of the Plaintiffs and 3rd Party Defendants: the State Defendants have no authority, express or implied, to regulate Kunz's placement of billboards on the subject property, held in trust for the Shivwits.

October 22, 2003
Date

Markus B. Zimmer
Clerk

/s/ [Illegible]
(*By*) *Deputy Clerk*

APPENDIX C

IN THE UNITED STATES COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SHIVWITS BAND OF PAIUTE INDIANS; and KUNZ & COMPANY d.b.a. KUNZ OUTDOOR ADVERTISING, a California Corporation, Plaintiffs and Counter-Claim Defendants, vs. STATE OF UTAH, UTAH STATE DEPARTMENT OF TRANSPORTATION, and ST. GEORGE CITY, a Utah Municipal Corporation, Defendants and Counter-claim and Third-Party Plaintiffs, vs. BRUCE BABBITT, in his capacity as Secretary of the United States Department of the Interior; ADA DEER, in her capacity as Assistant Secretary of Indian Affairs; WALTER R. MILLS, in his capacity as Area Director of the Bureau of Indian Affairs; and the BUREAU OF INDIAN AFFAIRS, Third-Party Defendants.	ORDER (Filed Aug. 14, 2000) Case No. 2:95CV1025C

This case requires the court to determine the rights and responsibilities of various federal, state, Indian, and private actors to use or limit the use of certain property adjacent to Interstate Highway 15 within the St. George City limits. The historical and procedural backgrounds to this case are complex and raise issues of administrative and environmental law as well as federal Indian law.

This action arose after the Bureau of Indian Affairs ("BIA") took property into trust for the benefit of the Plaintiff Shivwits Band of Paiute Indians ("Shivwits Band") and approved a lease agreement between the Shivwits Band and Plaintiff Kunz and Company, d.b.a. Kunz Outdoor Advertising ("Kunz"). The parties involved in this lawsuit disagree as to whether the acquisition of the land was valid and whether the approval of the lease was valid. Assuming the acquisition and the lease were lawful, the parties disagree as to what laws may be enforced on the property. The action is before the court on three motions for summary judgment.

Factual Background

On July 16, 1993, Kunz contacted the Shivwits Band and proposed a business venture. Kunz proposed that the Shivwits Band purchase property with money furnished by Kunz. (*See* Esplin Aff. at 4, attached as Ex. A to Pls.' Mot. Summ. J.) In exchange, the Shivwits Band would agree to grant Kunz the exclusive right to place outdoor advertising signs on the property. (*See id.*)[1]

[1] According to the Complaint, the Shivwits Band entered into five leases with Kunz. A "sample" lease (attached as Ex. D to Compl.) extends for a twenty-year period. The lease requires Kunz to pay the

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The Shivwits Band agreed to the proposal, was advanced money by Kunz, and bought property on August 9, 1994. (*See id.* at 5.) The property is located in St. George City, some distance from the Shivwits Band Reservation. On the same day, the Shivwits Band conveyed the property to the United States to be held in trust for the tribe. In November 1994, the BIA determined that no environmental review was required for the act of taking the property into trust.

An off-reservation trust acquisition, like the one at issue here, must be approved by the Department of the Interior. On May 10, 1995, the Shivwits Band submitted the necessary administrative documents for approval of the trust acquisition to the BIA. The request that the property be accepted in trust was approved on August 31, 1995, by the local office of the BIA. Following acceptance of the property in trust, the parties finalized five separate leases covering the property.

Before the acquisition was approved, an environmental assessment (EA 94-3) was prepared for the act of approving the lease agreement. Following completion of EA 94-3 on July 6, 1995, a Finding of No Significant Impact ("FONSI") was reached on August 31, 1995 (the same day the acquisition decision was approved by the BIA).[2] The Secretary of Interior then approved the lease

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Shivwits Band $1800 every year for the first fifteen years. For the last five years of the lease, Kunz is required to pay the Shivwits Band $2500 per year.

[2] There was some confusion among the parties as to the date of the FONSI. (*See* United States' mem. in Resp. to Third-Party Pls.' Mot. Summ. J. at 2, ¶ 5b). According to the United States, the "correct date is August 31, 1995." (*Id.*)

agreement with Kunz on September 11, 1995.[3] (*See* Ex. 20 to Admin. R.) The billboards were built soon thereafter.

Procedural History

Defendants State of Utah, the Utah State Department of Transportation and St. George City (collectively, "Defendants") contend that the statute authorizing acquisition of the land is unconstitutional, that the acquisition of the land and approval of the lease agreements violated applicable environmental laws and procedural regulations, and that the placement of billboards on the property is unlawful under state (Utah Outdoor Advertising Act, Utah Code Ann. §27-12-136.1)[4] and local law (St. George City Code, Title 9, chapter 8).[5]

On October 25, 1995, the Utah Attorney General's office, on behalf of the Utah Department of Transportation, threatened criminal suit against Kunz if construction of the signs did not immediately cease. Kunz ignored the warning and continued construction. On November 3, 1995, the City of St. George issued a stop work order,

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[3] Like the decision to take the land into trust, approval of the Secretary of the Interior of the lease arrangement was necessary to give the leases effect. *See* 25 U.S.C. § 415.

[4] The statute designates certain areas where outdoor advertising may be placed. In addition, Defendants contend that the signs violate State law because Plaintiffs lack a valid State permit as required by Utah Code Ann. § 27-12-136.7(1). The placement or maintenance of the signs would be a criminal misdemeanor under Utah Code Ann. § 27-12-136.12.

[5] St. George City Code §§ 9-8-4(B)(4) and 9-8-2(Q) govern off-premise signs. The Defendants allege that the Plaintiffs' signs violate these Code sections because they do not comply with spacing requirements and would not meet any of the exceptions for allowance of signs.

forbidding Kunz from further construction of the signs on the ground that it violated city and state outdoor advertising regulations and Kunz had no city or state sign permits.

On November 17, 1995, Kunz and the Shivwits Band (collectively, "Plaintiffs") sued for declaratory judgment and preliminary and permanent injunctive relief against the Defendants. Plaintiffs' lawsuit seeks (1) an order declaring that the property is lawfully held, and (2) injunctive relief restraining Defendants from interfering with the construction and operation of the billboards.

On November 22, 1995, Defendants filed a counterclaim against Plaintiffs and a third-party claim against Bruce Babbitt, Ada Deer, Walter Mills, and the BIA (collectively "Third-Party Defendants"). The counterclaim and third-party claim allege that (1) the statute authorizing land acquisitions, 25 U.S.C. § 465 (and the accompanying regulation, 25 C.F.R. § 1.4), is unconstitutional; (2) the taking of the land in trust and the approval of the lease were wrongly accomplished because the Third-Party Defendants violated the National Environmental Policy Act ("NEPA") and Department of Interior ("DOI") regulations; and (3) the erection of billboards on the property violates certain state and local regulations.[6]

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[6] The three causes of action listed above summarize the nine causes of action actually outlined in the counterclaim and third-party claim. As listed by the Third-Party Plaintiffs, the nine claims for relief are: (1) 25 U.S.C. § 465 is unconstitutional; (2) violation of 25 C.F.R. § 151 and 25 C.F.R. § 2.7; (3) violation of Utah Code Ann. §§ 27-12-136.1, 136.40), 136.7; (4) violation of St. George City Code §§ 9-8-4(B)(4) and 9-8-2(Q); (5) violation of 25 U.S.C. § 766(d); (6) violation of NEPA in connection with the acceptance of lands into trust; (7) violation of 25 U.S.C. § 465 and the applicable regulations; (8) violation of NEPA in connection with the approval of the leases; and (9) injunctive relief. The

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On September 18, 1996, the parties agreed to delay the proceedings pending the Supreme Court's consideration of a decision by the Eighth Circuit Court of Appeals, which had found 25 U.S.C. § 465 an unconstitutional delegation of legislative power. *See State of South Dakota v. United States Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995). (Section 465, as mentioned above, and discussed below, allows the government to take land into trust for Indian tribes). On October 15, 1996, the Supreme Court vacated the Eighth Circuit decision and remanded. See *Department of the Interior v. South Dakota*, 519 U.S. 919 (1996). Following the Supreme Court's decision, the parties filed the pending motions for summary judgment.

Pending Motions

The three groups of parties have all moved for summary judgment. In support of their motions, the parties make the following arguments:

(1) *Third-Party Defendants*: (1) the court lacks subject matter jurisdiction over the Third-Party Defendants for certain claims because there has been no waiver of sovereign immunity;[7] (2) the Third-Party Defendants fully complied with statutes and regulations applicable to taking land into trust and approving the lease agreements; and (3) the lands held in trust for the

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third cause of action is brought only by the State of Utah and the fourth cause of action is brought only by the City of St. George. The other seven causes of action are brought by all counterclaim and third-party Plaintiffs.

[7] The Third-Party Defendants' sovereign immunity defense does not apply to violations of NEPA claims and is, therefore, not considered in this order.

Shivwits Band are Indian Country and not subject to federal, state, or local law and regulation.

(2) *Plaintiffs*: (1) the Shivwits Band followed all required procedures under 25 U.S.C. § 465 in taking the lands into trust; (2) federal, state, and local laws are not enforceable on the property under federal law and the principle of federal preemption; and (3) no federal laws authorize regulation of billboards on Indian Lands.

(3) *Defendants*: (1) 25 U.S.C. § 465 is an unconstitutional delegation of legislative power; (2) the taking of the property in trust and the approval of the sign lease by federal officials was improper because (a) it occurred without the required consideration of environmental laws and/or (b) the Secretary of the Interior did not follow the required procedures; (3) even if the property is properly held in trust, there is no sufficient basis for exempting the land from applicable federal, state, and local laws restricting the placement of outdoor advertising; and (4) involvement of the Shivwits Band solely to validate the billboards constitutes "marketing an exemption," a practice the Supreme Court has held invalid.

Analysis

A. 25 U.S.C. § 465

In 1934, Congress passed the Indian Reorganization Act, 25 U.S.C. § 461, et seq., with the purpose of protecting Indians and encouraging and fostering self-government by the various Indian tribes. *See, e.g., Cheyenne River Sioux Tribe v. Kleppe*, 424 F.Supp. 448 (D. S.D. 1977), *rev'd on other grounds*, 566 F.2d 1085 (8th Cir. 1977). Of particular importance to this case is 25 U.S.C. § 465, a broad delegation of power concerning the acquisition of property in trust:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, . . . any interest in lands . . . within or without existing reservations, including trust or otherwise restricted allotments . . . for the purpose of providing land for Indians.
>
> . . .
>
> Title to any lands or rights acquired pursuant to [this and other sections of this title] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Id.

Defendants argue that the statute is an unconstitutional delegation of legislative power because it contains no limits on the amount of land to be taken and has no ascertainable standards against which a reviewing court can test the exercise of the delegated power. The Tenth Circuit has squarely rejected this argument, acknowledging that the statute itself places limits on the Secretary's discretion. *See United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), *cert. denied* 120 S.Ct. 1960 (2000). Therefore, 25 U.S.C. § 465 is constitutional.

B. Compliance with NEPA

The BIA did not prepare an environmental impact statement ("EIS") or environmental assessment ("EA") in connection with the acceptance of the land into trust. The BIA did, however, prepare an EA in connection with the approval of the lease between Kunz and the Shivwits Band. Defendants contend that the BIA was required to

prepare an EA (at least) for the acquisition of the property.[8] Plaintiffs and Third-Party Defendants respond that no NEPA review was necessary for the land acquisition, or, alternatively, that the EA prepared in connection with the lease approval satisfies any NEPA requirements for the acquisition of the land.

1. Standard of Review

NEPA requires federal agencies to evaluate the environmental impacts of federal actions. *See* 42 U.S.C. § 4332. The Administrative Procedure Act ("APA") sets forth the standard of review to be applied by courts in reviewing agency actions. Among other things, the APA directs courts to hold unlawful agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Generally, an agency decision will be considered arbitrary and capricious if 'the agency had relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1215 (10th Cir. 1997) (internal citations omitted). Under an arbitrary and capricious standard, a court may disapprove of an agency's decision only if the agency

[8] This is only one of many violations the Defendants allege. Due to the conclusion on this issue, the court does not address the Defendants' further arguments at this time. *See United States v. Burlington N. R.R. Co.*, 200 F.3d 679, 699 (10th Cir. 1999) ("It is fundamental that federal courts do not render advisory opinions. . . .").

made a "clear error of judgment." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

2. Categorical Exclusion

In general, an EA or EIS is required for every agency action unless the action is entitled to categorical exclusion ("CE") status. *See Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1435 (10th Cir. 1996) ("For proposed actions the environmental effects of which are uncertain, the agency must prepare an [EA] to determine whether a significant effect will result from the proposed action.").[9] CEs are categories of actions which do not, individually or cumulatively, have a significant effect on the human environment and therefore, do not require an EA or EIS. *See* 40 C.F.R. § 1508.4 ("[N]either an environmental assessment nor an environmental impact statement is required" when a CE applies.). As explained in the Department of Interior Manual,

> *An EA will be prepared for all actions, except those covered by a categorical exclusion,* covered sufficiently by an earlier environmental document, or for those actions for which a decision has already been made to prepare an EIS. The purpose of an EA is to allow the responsible official to determine whether to prepare an EIS.

516 Dep't Manual 3.2 (emphasis added). (Portions of the Department Manual are attached as Exhibits B-E to

[9] As noted below, an EA is not required when the action is "covered sufficiently by an earlier environmental document" or when the agency has already decided to prepare an EIS. 516 Dep't Manual 3.2. None of the parties contend that any exception (other than the a CE) applies in this case.

Defendants' Supplementary Memorandum.) According to a BIA Manual (titled "NEPA Handbook"), the actions that are entitled to CE designation are those that:

> have been determined not to individually or cumulatively affect the quality of the human environment and, therefore, they do not normally require preparation of either an EA or EIS. However, exceptions may exist in which a normally excluded action may result in significant effects upon the environment, and in such cases an EA or EIS must be prepared. . . . If there is any doubt whether an exception applies, an EA should be prepared.

30 BIA Manual Suppl. 1, 3.2(A). (Portions of the BIA Manual are attached as Exhibits A to Defendants' Supplementary Memorandum.)

The decision to apply a CE is reviewed under the usual arbitrary and capricious standard. *See Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1456 (9th Cir. 1996) ("An agency satisfies NEPA if it applies its categorical exclusions and determines that neither an EA nor an EIS is required, so long as the application of the exclusions to the facts of the particular action is not arbitrary and capricious."); *Hells Canyon Preservation Council v. Jacoby*, 9 F.Supp.2d 1216, 1232 (D. Ore. 1998) (same).

The Defendants argue that the decision to categorically exclude the act of acquiring the property was arbitrary and capricious since no CE applies to that agency action. In a two-page "Categorical Exclusion Checklist" ("Checklist") dated November 15, 1994, BIA representatives concluded that the proposed action (the taking of the property into trust) was entitled to a CE designation. (The

Checklist is attached as Exhibit 7 to the Administrative Record.)[10]

Since the Checklist does not clearly identify any basis for a CE, the first issue is whether there is any CE that applies to decisions to acquire land.[11] According to the BIA Manual, CEs are those actions listed in 516 Department Manual 2, Appendix 1 and 516 Department Manual 6, Appendix 4.4. *See* 30 BIA Manual Suppl. 3.2.

516 Department Manual 2, Appendix 1 lists eleven CEs, and none apply to acquisition of land. (This document is attached as Exhibit C to Defendants' Supplementary Memorandum.) 516 Department Manual 6, Appendix 4 lists five CEs. (This document is attached as Exhibit E to

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[10] Although the Checklist mentions the lease agreement, it is clear that the Checklist means to categorically exclude the land acquisition, not the lease arrangement. Under the heading "Brief description of proposed action," for example, the document reads, "The Shivwits Band of Paiute Indians is requesting two small parcells [sic] of newly acquired property be taken into trust."

[11] The discussion in the "Explanation and/or remarks" section of the Checklist is of little help. In its entirety, this section reads:

> 516 DM 2.3A(3) Applicable or not applicable
>
> 516 DM 6 App. 4 – Not Applicable
>
> 30 BIAM Suppl., 3.2A BIA C.E. In Addition to
>
> 516 DM 2.3A(3) –
>
> 4.4 I.2. The Shivwits Band plans to lease 5 sign spaces for outdoor advertising. This will give the Band the opportunity for economic development and much needed income now and in the future. There is the possibility for future economic development when the surrounding area is developed.

The last reference to "4.4 I.2" likely refers to 516 Department Manual 6, Appendix 4, paragraph 4.4(I)(2). As set forth below, paragraph 4.4(I)(3) is the more appropriate exclusion, not 4.4(I)(2).

Defendants' Supplementary Memorandum.) 516 Department Manual 6, Appendix 4, paragraph 4.4(I) identifies "Land Conveyance" as a CE, and appears to be the only possible relevant exclusion:

> The following BIA actions are hereby designated as categorical exclusions. . .
>
> (1) Land transfers from Federal or State Agencies or other DOI Bureaus to the BIA as land to be held in trust for the Indian tribe(s) involving no development, physical alteration, or change in land use.
>
> (2) Purchase, sale, abandonment or exchange of tracts of land, mineral rights or other interests in land in which no change in land use or operation is planned.
>
> (3) Lands acquired pursuant to 25 U.S.C. 465 . . . *where no development, physical alteration, or change of land use after acquisition is known or planned.*

Id. (emphasis added). Although the Checklist does not clearly identify its basis for a CE, the only arguable ground for an exception is the exclusion identified in 516 Department Manual 6, Appendix 4, paragraph 4.4(I)(3) (hereinafter "4.4(I)(3)").

Having concluded that a CE *could* apply to the agency action, the next issue is whether the action in this case falls within the scope of that CE. By its own terms, 4.4(I)(3) does not apply when "development, physical alteration, or change of land use after acquisition is *known or planned.*" *Id.* (emphasis added). Here, the Kunz-Shivwits Band lease was clearly contemplated at the time the land was acquired. (Indeed, the Checklist itself reveals

that the BIA knew of the billboard lease at the time of acquisition.) Under its express terms, then, 4.4(I)(3) would not categorically exclude the land acquisition from NEPA review.

Plaintiffs and Third-Party Defendants contend, however, that 4.4(I)(3) does apply because the BIA (and the DOI) interprets 4.4(I)(3) to grant "CE status so long as appropriate NEPA analysis is performed *before* such a change in land use takes place." (Joint Suppl. Mem. at 3) (italics in original.) As discussed below, an EA regarding the leasing arrangement was completed on July 6, 1995 (before the change in land use (i.e., the construction of the billboards) took place). If Plaintiffs and Third-Party Defendants' interpretation of 4.4(I)(3) is correct, then, the CE would be valid since an EA was performed before the change in land occurred.

When reviewing an agency's application of its own regulation, the agency's interpretation of its regulation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 509 (1994); *Alaska Ctr. for the Env't v. United States Forest Serv.*, 189 F.3d 851, 857 (9th Cir. 1999); *Southern Utah Wilderness Alliance v. Dabney*, 7 F.Supp.2d 1205, 1209 (D. Utah 1998). "In other words, [a court] must defer to the Secretary's interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.'" *Thomas Jefferson Univ.*, 512 U.S. at 509 (internal citations omitted).

In support of their contention that 4.4(I)(3) affords CE status for all land acquisitions so long as NEPA review

takes place before any contemplated change in the land, Plaintiffs and Third-Party Defendants cite three sources. First, the parties cite 61 Federal Register 67845, 67845-46 (Dec. 24, 1996), which summarizes comments and responses on 516 Department Manual 6, Appendix 4:

> *Response*: It is unrealistic to expect land to be conveyed with no plan whatsoever for its future use. Whether or not the conveyance may be categorically excluded is a matter of judgment by the BIA official responsible for NEPA compliance as to how well the plan is established. The categorical exclusion does not, however, allow for any development or physical alteration to actually take place. *Comment*: Recommendation that all land transfers be categorically excluded, regardless of plans for future development or physical alternation, so long as the subsequent activity will be subject to NEPA review.
>
> *Response*: This is in fact the way the categorical exclusion is meant to operate. What the BIA official responsible for NEPA compliance must decide is whether or not plans for development or physical alteration are established to the point where NEPA review of the proposed activity should be done in conjunction with the land transfer.

Id. (This portion of the Federal Register is attached as Exhibit A to the Joint Supplemental Memorandum.)[12]

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[12] As noted above, the Checklist is dated November 15, 1994, well before the publication of this comment and response. There is, however, no reason to believe that the interpretation of 4.4(I)(3) would have been different in 1994.

Next, the parties cite a June 9, 1995 letter from the BIA Phoenix Area Director stating that "Our Branch of Environmental Quality Services has advised that the proposed acquisition may be considered to be a categorical exclusion under NEPA, now that we have amended the [CE] checklist to indicate that '[further environmental documentation will be competed [sic] at the time of leasing.'" (This letter is attached at Exhibit 12 to the Administrative Record.)

Finally, Plaintiffs and Third-Party Defendants cite the declaration of Wayne Nordwall, Director of the Western Regional Office of the BIA. (Nordwall's declaration is attached as Exhibit C to the Joint Supplementary Memorandum.) According to Nordwall,

> The [DOI] has identified trust acquisitions as categorically excluded actions where there will be no immediate change in use of the land. . . . Since the two parcels were being acquired for economic development, this office amended the Checklist to make it clear that environmental documentation (an EA or EIS) would be necessary at the time of leasing. This is a normal procedure of the [BIA] when a change in use for the land is known, but the change will not occur until some time after the land will be taken into trust.

(Nordwall Decl. ¶ 5.)[13]

Although the BIA and DOI agree that "all land transfers be categorically excluded, regardless of plans for future development or physical alternation, so long as the

[13] The last two sources are of limited value since they do not refer to written agency policy, but rather opinions of agency employees.

subsequent activity will be subject to NEPA review," the DOI's own interpretation of 4.4(I)(3) articulates an express limitation: "Whether or not the conveyance may be categorically excluded [depends on] *how well the plan is established*. . . . What the BIA official . . . must decide is *whether or not plans for development or physical alteration are established* to the point where NEPA review of the proposed activity should be done in conjunction with the land transfer." 61 Fed. Reg. 67845 (emphasis added). A fair interpretation of these sentences is the following: if the plans for land development are sufficiently "established," NEPA review of the land change decision should take place at the same time the land is acquired. In that case, 4.4(I)(3) would not categorically exclude the act of acquiring the land, and NEPA review for both actions would be necessary. If, on the other hand, the plans for development are not sufficiently "established," the CE applies and no NEPA review is necessary for the acquisition itself.

Even assuming the DOI's interpretation is reasonable,[14] 4.4(I)(3) would not categorically exclude the acquisition of the property in this situation. Kunz contacted the Shivwits Band as early as July 16, 1993 to discuss a leasing arrangement, and a lease was executed by May of 1994. By August 1994, the land had been conveyed to the United States to be held in trust. By the time the Checklist was completed on November 15, 1994, the procedures necessary to finalize both the land acquisition and the lease were well underway. In addition, BIA officials were

[14] This interpretation does not readily flow from 4.4(I)(3) itself, which appears to apply only when no development is "known or planned." Based on the analysis below, however, the court need not decide whether the DOI interpretation is reasonable or not.

well aware of the pending leasing arrangement at the time the land was taken into trust and before the Checklist was finalized. This was not a case where land was acquired with some undefined plan of future land development; rather, this is a case where preparation for the future land development *preceded* the land acquisition itself, and was well "established" when the land transfer was being considered.

The Checklist offers no justifiable basis that would support the decision to forego NEPA review of the land acquisition in this case. There is no reasonable basis supporting the conclusion that 4.4(I)(3) applies and no reasonable rationale is offered by the parties. Hence, by the express terms of 4.4(I)(3) and the DOI's own interpretation of that CE, the acquisition of the land was not entitled to CE status. The decision to categorically exclude the land acquisition was, therefore, arbitrary and capricious.

3. EA 94-3

Since no CE applied to the acquisition of the property in this case, NEPA review was required for that act. *See* 516 Dep't Manual 3.2. Plaintiffs and Third-Party Defendants contend that the EA completed for the billboard lease (i.e., EA 94-3) was adequate to satisfy any required NEPA review of the land acquisition. (EA 94-3 is attached as Exhibit 16 to the Administrative Record.) First, Plaintiffs and Third-Party Defendants note that EA 94-3 was completed on July 6, 1995, nearly two months before the land was taken into trust on August 31, 1995. Since EA 94-3 was completed before the land acquisition, Plaintiffs and Third-Party Defendants contend that that NEPA

review includes both the lease approval and the acquisition of the land. Second, Plaintiffs and Third-Party Defendants stress that "because the trust decision did not itself involve any physical alteration of the property, [the decision to acquire the land] alone does not add any potential element of significant environmental impact that should be analyzed in an EA that was not already analyzed in the EA for the leases." (Joint Suppl. Mem. at 7.) Hence, "remanding the trust decision to the agency for a separate EA would serve no meaningful purpose, because the pertinent issues were already addressed in the billboard lease EA which was prepared before the trust decision was made." (*Id.* at 9.) These points are taken in turn below.

First, Plaintiffs and Third-Party Defendants contend that EA 94-3 includes both the decision to acquire the land and the decision to approve the lease. EA 94-3, however, focuses exclusively on the lease itself, not the acquisition of the land. Under the heading "Purpose and Need," the document states that "Kunz . . . has submitted a request for a lease to erect five (5) outdoor advertising signs [on] property that is being purchased by the Shivwits Band of Paiute Indians" (EA 94-3 at 1.) Under the heading "Proposed Action and Alternatives," the document reads, "The proposal is for a 15-year, renewable, lease for five sign sites for the erection of five 14' x 48' outdoor advertising signs." (*Id.*) In its discussion of "Environmental Consequences," EA 94-3 focuses on the environmental effects of sign construction, access to signs, and sign maintenance. (*See id.* at 3.)[15]

[15] This conclusion is not surprising given the fact that the act of acquiring the land had been categorically excluded in November 1994.

No part of the EA discusses the land acquisition itself. In fact, although the first page of the EA states that the property "is being purchased by the Shivwits," a subsequent sentence indicates that the Shivwits Band have already completed the purchase: "The land *now belongs to the Shivwits Band. . . .*" (*Id.* at 1, 4.) Since EA 94-3 applied only to the approval of the lease, not the acquisition of the land, the EA does not satisfy the NEPA review required for the acquisition of the land itself.[16]

Plaintiffs and Third-Party Defendants next claim that the decision to acquire the property did "not add any potential element of significant environmental impact that should be analyzed in an EA that was not already analyzed in the EA for the leases." (Joint Suppl. Mem. at 7.) However, according to the DOI regulations that have been discussed above, only some land acquisitions are categorically excluded, and none apply in this ease. Consequently, the Third-Party Defendants were required to conduct an EA to evaluate the possible environmental implications of acquiring the land, and their failure to do so violates NEPA.

The failure to comply with the procedural requirements of NEPA is more than de minimus and does not (as Plaintiffs and Third-Party Defendants contend) "elevate form over substance." *Id.* "NEPA has twin aims. First, it 'places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.'

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[16] The subsequent FONSI supports this conclusion. Dated August 31, 1995, the FONSI clearly applies only to the lease, not the land acquisition. The document begins by stating that "The Shivwits Band of Paiute Indians propose to lease to Kunz and Company five (5) sign sites . . . ," and does not mention the acquisition of land itself.

Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (internal citations omitted); *Concerned Citizens Alliance, Inc. v. Slater*, 176 F.3d 686, 705 (3d Cir. 1999) ("NEPA ensures that an agency has before it detailed information on significant environmental impacts when it makes its decisions and guarantees that this information is available to a larger audience."); *Committee to Preserve Boomer Lake Park v. Department of Transp.*, 4 F.3d 1543, 1554 (10th Cir. 1993). The way in which NEPA achieves its goals is through procedural requirements. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (NEPA "does not mandate particular results," but it does "prescribe the necessary process."); *Laguna Greenbelt, Inc. v. United States Dep't of Transp.*, 42 F.3d 517, 523 (9th Cir. 1994) ("NEPA does not mandate particular substantive results, but instead imposes only procedural requirements.").

The failure to prepare any NEPA review of the land acquisition was a procedural harm that frustrated NEPA's goals: for example, relevant information was not made available to the wider audience participating in the agency decision-making process prior to the agency action and members of the public were denied sufficient opportunity to submit comments. *Cf. Laguna Greenbelt, Inc.*, 42 F.3d at 527 (finding that the NEPA violations did not frustrate NEPA's goals when an incomplete EA was prepared since the public had sufficient information and was able to comment about the proposed action before the final decision was made). This is not a case where an arguably imperfect EA was prepared or the agency's decision to not

prepare an EIS is at issue. In this case, the agency decided not to conduct any environmental analysis at all. The BIA violated the procedural requirements of NEPA; therefore, the agency action must be invalidated.

Conclusion

Based on the analysis above, the court concludes that the failure to prepare an EA in connection with the acquisition of the land violated the procedural requirements of NEPA. The court therefore GRANTS Defendants' motion for summary judgment in part and orders that the required NEPA process be undertaken. *See Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000) (requiring that defendants set aside a wrongly-reached FONSI, and "begin the NEPA process afresh [by preparing] a new EA").

SO ORDERED this 11 day of August, 2000.

BY THE COURT:

/s/ Tena Campbell
TENA CAMPBELL
United States District
Judge

APPENDIX D

25 U.S.C. § 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of the Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual

Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT,
DISTRICT OF UTAH CENTRAL DIVISION

EXHIBIT
D

BILLBOARD LEASE 4272NS

This lease made and entered into this first day of September, 1996 by and between the Shivwits Band of Paiute Indians, a federally recognized Indian Tribe (hereinafter referred as the "Tribe"), as Lessor, and Kunz & Company, a California corporation (herein called "Lessee"), under the provision of the Act of August 9, 1955, as amended (69 Stat. 539; 25 U.S.C. § 415), as implemented by 25 C.F.R. § 162, and any amendments thereto relative to business leases on restricted lands.

WITNESSETH

That in consideration of the mutual covenants and agreements hereinafter set forth and the rents to be paid as specified in this agreement, the Tribe hereby leases, rents and lets unto Lessee, its successors and assigns, exclusive use at the premises herein described necessary for the placement of one 14X48, two sided, illuminated, monopole billboard structure which shall be located adjacent to the east line of the right-of-way of Interstate 15, 1.2 miles south of Bloomington (Exit #4), Washington County, Utah and which is designated as number 4272NS on the attached plot plan, which it incorporated herein and made part of this lease.

The term "premises" as used herein shall mean that portion of the real property where Lessee's structure is

placed. The term "real property" as used herein shall mean the following described real property, as a portion of the Shivwits Band of Paiute Indian Reservation, lying in the NW 1/4, SE 1/4 of Section 13, Township 43 South, Range 16 West, Salt Lake Base and Meridian.

1. The leased premises shall be used solely for the placement of a billboard for advertising purposes. Lessee agrees not to permit the billboard to be used for the advertisement of any morally offensive or unlawful purpose.

2. All materials placed on said premises by Lessee shall be maintained in a good and workmanlike manner.

3. The Tribe hereby grants to Lessee the right to construct, illuminate, maintain and remove the billboard, and to enter upon the Shivwits Band of Paiute Indian Reservation for such purposes.

4. The term of this lease shall be twenty (20) years from the date of erection of the billboard; which shall not occur later than twelve (12) months following approval of this lease by the Secretary of Interior. This lease shall terminate if not approved by the Secretary of the Interior within thirty-six (36) months of this date.

5. As rental for the leased premises, Lessee shall pay to the Tribe the sum of $1,800.00 (eighteen hundred and 00/100) per year from the date of erection of the billboard as rent for years one through fifteen and $2,500.00 (twenty-five hundred and 00/100) per year for years fifteen through twenty. The sum of $27,000.00 shall be payable upon the execution of this lease, which sum shall represent advance rent to be applied to the first 180 (one hundred eighty) months from the date of erection of the

billboard. If the lease is terminated by either party, all such prepaid and unearned rentals shall be applied to any other such lease agreements in effect between the parties hereto, if any.

6. The Lessee shall save the Tribe harmless from all damages to persons or property by reason of accidents from the negligent acts of its agents, employees or others employed in the construction, maintenance, repair, or removal of its billboard on the property.

7. The parties agree that the exact location of future advertising signs or advertising matter relating to present or future Tribal business enterprises within one thousand (1000) feet of the subject billboard shall be mutually agreed to by the parties hereto. Tribe further agrees that, during the term of this lease, lessee shall have the exclusive right to place billboards viewable from the traveled way of Interstate 15 on any real property in which the Tribe has an interest.

If the view of the subject billboard is obstructed or its value wholly or partially impaired, or the use of the subject billboard is prevented by law, Lessee may proportionately reduce the rental or cancel this lease and receive a pro-rate refund of prepaid rent by giving notice in writing of such impairment, obstruction or prevention of use.

8. The Tribe shall have the right to terminate this lease at any time during the period of this lease if the Tribe is to improve the premises by erecting thereon a permanent private, commercial or residential building. Lessee shall elect to remove or relocate its billboard at the Lessee's expense within ninety (90) days after receipt of a written notice from the Tribe that such construction is to occur. If

relocation is not elected, the Tribe will return to the Lessee a pro-rata refund of prepaid rent. All materials placed on said premise by Lessee shall remain the property of the Lessee and may be removed by the Lessee at any time. Lessee may terminate this lease at any time with a ninety (90) day written notice to the Tribe.

9. The Tribe represents that it is the beneficial owner of the property covered by this lease and has the authority to execute this lease, subject to the approval of the Secretary of the Interior. All rents to be paid pursuant to this lease, and all notices are to be forwarded to the Tribe at the address noted below.

10. This lease shall constitute the sole agreement of the parties relating to the lease of the above described property. Neither party will be bound by any statements, warranties, or promises, oral or written, unless such statements, warranties or promises are set forth specifically in this lease.

11. Unless otherwise provided herein, a sublease, assignment, or amendment of this lease may be made only with the approval of the Secretary of the Interior and the written consent of all parties to this lease.

12. It is understood and agreed between the parties hereto that if any installment of rental is not paid within thirty (30) days after becoming due, interest at the rate of ten (10) percent per annum will become due and payable from the date such rental became due and will continue until said rental is paid.

13. Nothing contained in this lease shall operate to delay or prevent a termination of Federal trust responsibilities with respect to the land by the Issuance of a fee patent or

otherwise during the term of the lease; however, such termination shall not serve to abrogate the lease. The Tribe and Lessee shall be notified by the Secretary of the Interior of any change in the status of the land.

14. No Member of, or Delegate to, Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this provision shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

15. It is understood and agreed that violations of this lease shall be acted upon in accordance with 25 C.F.R. 162.

16. No assent, express or implied, to any breach of any of the covenants, shall be deemed to be a waiver of any succeeding breach of any covenants.

17. It is understood and agreed that the covenants and agreements hereinbefore mentioned shall extend to and be binding upon the heirs, assigns, executors, and administrators of the parties of this lease. While the leased premises are in trust or restricted status, all of the Lessee's obligations under this lease, and the obligations of its sureties, are to the United States as well as to the Tribe.

18. It is further understood and agreed between the parties hereto that this lease shall be valid and binding only after approval of the Secretary of the Interior.

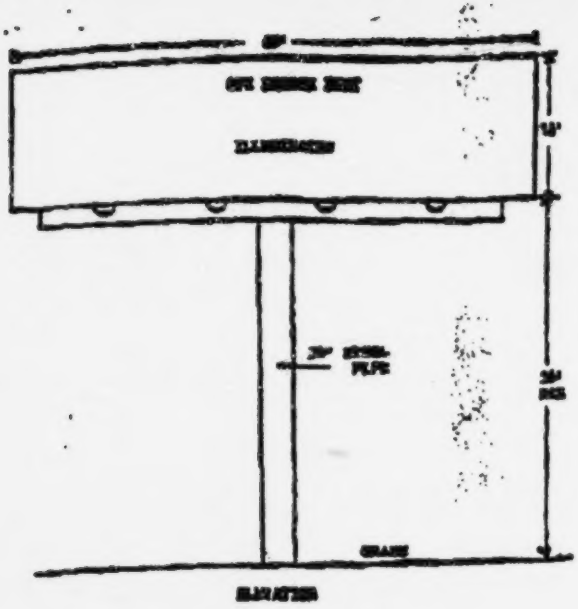
19. It is further agreed and understood between the parties that by executing this lease the Tribe does not surrender, waive, or impair any right, privilege or immunity secured to it as a federally recognized Indian Tribe.

ACCEPTED: KUNZ & COMPANY, LESSEE	ACCEPTED: SHIVWITS BAND OF PAIUTE INDIANS
By: /s/ _____	By: /s/ _____
Title Vice-President	Title: Shivwitz Band Chairman
Address: 1831 Commercenter East San Bernardino, CA 92408	Address: P.O. Box 448 Santa Clara, Utah 84765
Telephone: 714-888-0018	Telephone: 801-673-8270
Date: 5/2/94	Date: 5/13/94

APPROVED BY THE SECRETARY OF INTERIOR

/s/ _____

Date: 9-11-95



KLEIN
OUTDOOR ADVERTISING

TOM HANAGAN

4272 NS

I-15 East Line 1.2 miles
South of Bloomington (Exit #4)
SEC 13, T4S, R16W

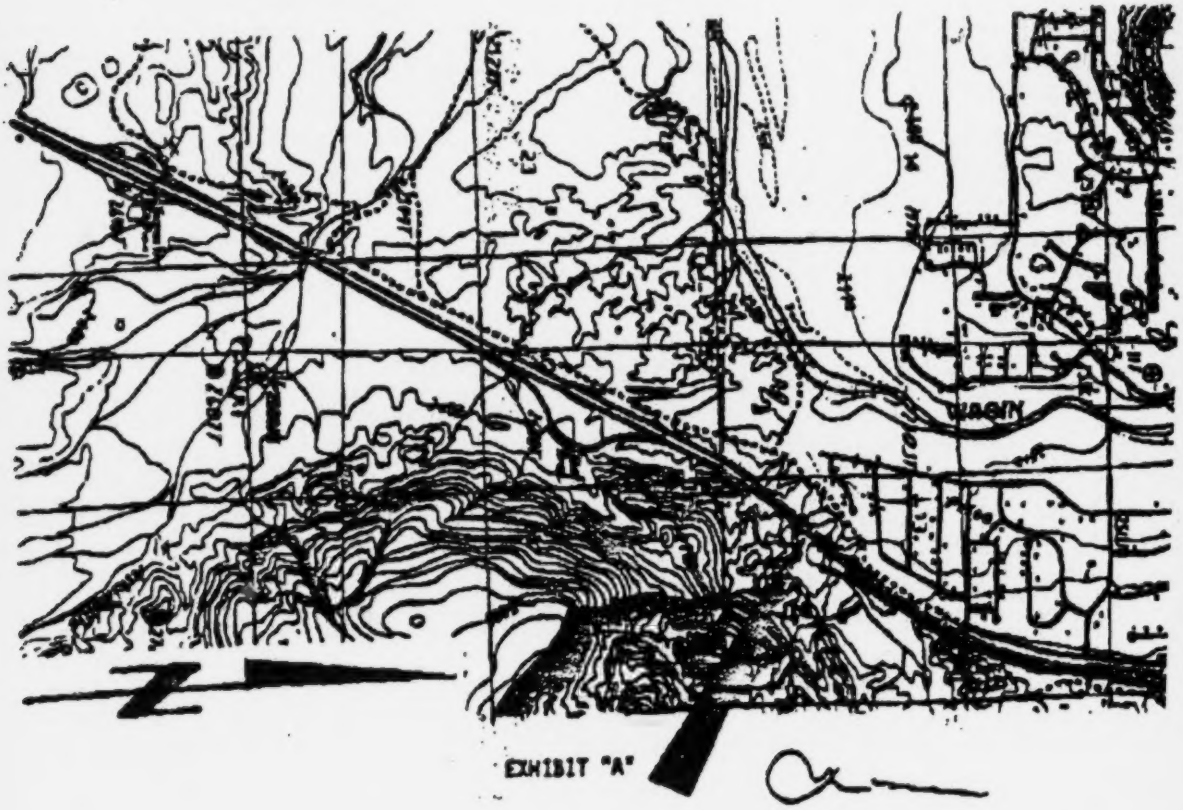


EXHIBIT "A"

APPENDIX F

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J,W,H&Mc File No.: 3668.0001

Dale T. White
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Boulder, CO 80302
Telephone: 303-443-1683

IN THE UNITED STATES DISTRICT COURT,
DISTRICT OF UTAH

CENTRAL DIVISION

SHIVWITS BAND OF PAIUTE INDIANS, KUNZ & COMPANY, d/b/a KUNZ OUTDOOR ADVERTISING, a California Corporation;	AFFIDAVIT OF PAUL D. HELD
Plaintiffs,	(Filed Nov. 17, 1995)
vs.	Case No.: 2:95CV 1025S
ST. GEORGE CITY, a Utah Municipal Corporation,	Judge:
Defendant.	

COUNTY OF SAN BERNARDINO)
) SS
STATE OF CALIFORNIA

Affiant Paul D. Held being sworn upon oath testifies and states:

1. I am an adult resident of San Bernardino County, California. I am a Vice president and general manager of Kunz & Company, d/b/a Kunz Outdoor Advertizing (Kunz), a California corporation which owns and leases outdoor advertising signs in the City of St. George, Washington County, Utah. As Vice President and general manager I have direct oversight responsibility for the five outdoor advertising signs and leases that are the subject of the above-captioned law suit. The statements set forth herein are based on personal knowledge and my own personal review of the subject leases.

2. Kunz has enetered into five leases with the Shivwits Band of Paiute Indians, dated September 1, 1995, providing Kunz the right to construct and install outdoor advertising displays south of Exit 4, the Bloomington exit, along the east side of Interstate 15 in St. George, Utah. On or about November 1, 1995, Kunz commenced construction of five double faced outdoor billboards at this location on the Shivwits Band Trust property.

3. On or about November 3, 1995, St. George City issued a "Stop Work Order" purporting to forbid Kunz from further work on construction of the signs on the basis that the proposed signs violated applicable City and Utah State regulations.

4. Kunz has presold all five north faces of the signs (viewable by southbound traffic) at $600.00 per month per face; which now appears to be below market. Kunz has presold three of the five south spaces (viewable by northbound traffic) for the sum of $1750.00 per month per face. In addition, there is considerable interest in the

remaining two south faces by such entities as Ence Homes in St. George. Each advertising contract is for a three year term and has an annual escalator clause based upon the increase in the consumer price index.

5. Once the structures are erected, the additional cost to maintain the advertising displays over and above Kunz's existing overhead, are minimal. Out of the monthly anticipated gross for each structure of $2,350.00 per month, the net income to Kunz should be approximately $1850 per sign. This translates to an annual approximate present net income of $111,000.

6. The leases between the Shivwits Band of Paiute Indians and Kunz are each for a period of twenty years. Due to the growth of the St. George and Mesquite markets, I anticipate that the value of the sign faces will increase considerably faster than the consumer price index in the years to come. However, even without such anticipated increase in the price resulting from a growing demand, the twenty year net income to Kunz would total approximately $2,220,000.00.

7. Based on Kunz's reliance on the U.S. Interior Department's designation of the subject parcels of real property as Shivwits Band Trust property, Kunz has invested approximately $200,000.00 for development costs and prepaid rent for the five signs.

8. The St. George City stop work order imposed on this project, is interfering with the advertising contracts described herein, under which assurances have been made to advertisers that the sign structures would be completed for the installation of advertising during the week of November 6th through November 10, 1995.

for the installation of advertising during the week of November 6th through November 10, 1995.

Dated this 15th day of November, 1995.

/s/ Paul D. Held
PAUL D. HELD

ACKNOWLEDGMENT

State of California |
|
County of San Bernardino |

On November 15, 1995, before me, Mary M. Torpey, Notary Public, personally appeared PAUL D. HELD, personally known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

/s/ Mary M. Torpey, Notary Public
Mary M. Torpey, Notary Public

MARY M. TORPEY
COMM. # 1067110
[SEAL] Notary Public – California
SAN BERNARDINO COUNTY
My Comm. Expires APR 23, 1999

APPENDIX G

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Randall N. Skanchy (#2968)
John J. Walton (#6678)
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Boulder, CO 80302
Telephone: 303-443-1683

**IN THE UNITED STATES DISTRICT COURT,
DISTRICT OF UTAH,
CENTRAL DIVISION**

SHIVWITS BAND OF PAIUTE INDIANS; and KUNZ & COMPANY, d/b/a KUNZ OUTDOOR ADVERTISING, a California Corporation; Plaintiffs, vs. STATE OF UTAH, UTAH STATE DEPARTMENT OF TRANSPORTATION, and ST. GEORGE CITY, a Utah Municipal Corporation, Defendants.	**AFFIDAVIT OF KEN ESPLIN** Case No. 2:95CV 1025S Judge David Sam

STATE OF UTAH, UTAH DEPARTMENT OF TRANSPORTATION, a Department of Utah State Government, and ST. GEORGE CITY,	)
Counter-Claimants,	)
vs.	)
SHIVWITS BAND OF PAIUTE INDIANS, KUNZ & COMPANY, d/b/a/ KUNZ OUTDOOR ADVERTISING a California Corporation,	)
Counter-Defendants.	)
STATE OF UTAH, UTAH STATE DEPARTMENT OF TRANSPORTATION, and ST. GEORGE CITY, a Utah Municipal Corporation,	)
Third-Party Plaintiffs,	)
vs.	)
BRUCE BABBIT, in his capacity as Secretary of the United States Department of the Interior, ADA DEER, in her capacity as Assistant Secretary of the Interior Indian Affairs, WALTER R. MILLS, in his capacity as Area Director of the Bureau of Indian Affairs, and the BUREAU OF INDIAN AFFAIRS,	)
Third Party Defendants.	)

STATE OF UTAH)
)
COUNTY OF WASHINGTON)

I, Kenneth Esplin, being first duly sworn, depose and say:

1. I am the Realty Officer for the U.S. Department of the Interior, Bureau of Indian Affairs. Southern Paiute Field Station, St. George, Utah.

2. My responsibilities include review of all land transactions, leases and other land-related activities that effect lands owned by the Indian tribes and bands within the region served by the Southern Paiute Field Station. This includes the lands of the five Indian bands of the Paiute Tribe of Utah (Shivwits, Kanosh, Koosharem, Cedar City, Indian Peaks Bands).

3. The land in question is two separate parcels of land in Section 13, Township 43 South, Range 16 West, Salt Lake Base and Meridian.

On July 16, 1993, Mr. Tom Flanigan from Kunz Outdoor Advertising Called Southern Paiute Field Station and asked if I would contact Merrill Wall and see if a meeting could be set up between Merrill and Tom to discuss a possible business venture with the Shivwits Band. I informed Mr. Flanigan that I would try to set up a meeting.

4. On July 30, 1993, Merrill Wall, Band Chairman for the Shivwits Band of Paiute Indians called and said that a meeting could be held on August 9, 1993 if this could be accommodated by Kunz Outdoor Advertising. A telephone call was placed to Mr. Tom Flanigan and the meeting was set up.

5. On August 9, 1993 a meeting was held between Merrill Wall, Shivwits Band Chairman and Tom Flanigan representing Kunz Outdoor. The meeting took place at 4:00 p.m. in the Southern Paiute Field Station Office in St. George. A proposal was made by Mr. Flanigan that Kunz Outdoor (Kunz & Company) would be willing to provide the money "up-front" for the Shivwits Band of Paiute Indians to purchase land in the South Periphery of the City of St. George or immediately south of the Utah State Line along the Interstate Highway 15 corridor leading into St. George. This money would be provided and property, if it could be found, would be purchased by the Shivwits Band of Paiute Indians.

6. The Shivwits Band in consideration for the up-front money would grant Kunz & Company the exclusive right to place outdoor advertising signs on the property. Mr. Wall, Shivwits Band Chairman, was personally in favor of the proposal as it would give the Shivwits Band an opportunity for economic development. However, Chairman Wall stated that such a proposal and transaction would need to be approved by the Shivwits Band Council. Part of the agreement proposed was that the lease fee to the Shivwits Band would be considered prepaid until the up-front money provided by Kunz & Company was amortized out.

7. A second meeting was held with the Shivwits Band Council and Tom Flanigan representing Kunz & Company on October 27, 1993. At this meeting the Shivwits Band Council approved pursuing the acquisition of the land. A search for suitable property was started soon after the October 27, 1993 meeting.

8. On November 9, 1993, a third meeting with Merrill Wall, Shivwits Band Chairman and Tom Flanigan of Kunz & Company was held in the Southern Paiute Field Station Office in St. George, Utah. At this time a possible parcel of land was discussed. The decision was made to pursue the purchase of property owned by the Sturzenneger family. A real estate agent was engaged to try to put together a purchase of the property.

9. Negotiations were started with C.R. and Dartha Sturzenneger in January of 1994 and culminated in an offer and acceptance on May 21, 1994. On or about July 7, 1994 I, Ken Esplin, telephone[d] the office of Mr. Gary Esplin, St. George City Manager, to see if the City Manager was in and if I could come across the street and visit with him. The Secretary in Mr. Esplin's office said to come on over. I walked across the street and was able to meet with Gary. I explained that the Shivwits Band was in the process of purchasing land in the South periphery of St. George along Interstate Highway 15 and asked him as City Manager if the City of St. George would provide a letter of support for this endeavor to the Shivwits Band of Paiute Indians. I was informed that he would need to discuss this with the City Council and would get back to me. After a couple of weeks I called Mr. Esplin, the St. George City Manager, and was told that he had not yet presented the request to the St. George City Council. Several weeks later I contacted Mr. Gary Esplin and asked again about the letter. At this time I was informed by Mr. Esplin that the City of St. George could not supply such a letter because they were afraid the land would be used for the purpose of erecting outdoor advertising signs and the City was opposed to outdoor advertising signs.

10. A letter notifying St. George City of this acquisition was mailed to the City of St. George on August 1, 1994, from the B.I.A. office in St. George. (Exhibit "A" attached hereto).

11. The Sale/Purchase transaction was completed on August 9, 1994 and the property was deeded to the Shivwits Band of Paiute Indians. The Shivwits Band immediately deeded the property to the United States of America in Trust for the Shivwits Band of Paiute Indians and made application for the land to be taken into trust.

12. The trust application was finally completed and the land was officially taken into trust on August 31, 1995.

13. Separate leases for the five sign sites were approved by the Secretary of the Interior of September 11, 1995. These leases are between the Shivwits Band of Paiute Indians as Lessor and Kunz & Company as Lessee.

/s/ Ken Esplin Dated: 12/4/95
Ken Esplin

COUNTY OF WASHINGTON)
) **ss.**
STATE OF UTAH)

The above named affiant Ken Esplin personally appeared before me, and first being duly sworn, did acknowledge the statements above and subscribed his name thereto.

WITNESS my hand and official seal.

My commission expires: 2/15/99.

[SEAL]

/s/ Tammie L. Taucer
Notary Public

NOTARY PUBLIC
TAMMIE L. TAUCER
624 North 1100 West
[SEAL] St. George, Utah 84770
My Commission Expires
February 15, 1999
STATE OF UTAH

APPENDIX H

PAUL M. WARNER,
United States Attorney (USB #3389)
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Assistant United States Attorney (#2808)
185 South State Street, #400
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Attorneys for the United States of America

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, Central DIVISION

SHIVWITS BAND OF PAIUTE INDIANS; KUNZ & COMPANY, dba KUNZ OUTDOOR ADVERTISING, a California Corporation,

Plaintiffs and Counterclaim Defendants,

vs.

STATE OF UTAH; UTAH STATE DEPARTMENT OF TRANSPORTATION; and ST. GEORGE CITY, a Utah Municipal Corporation,

Defendants and Counterclaim and Third-Party Plaintiffs.

vs.

BRUCE BABBIT, in his capacity as Secretary of the United States Department of the Interior; ADA DEER, in her capacity as Assistant Secretary of the Interior

Civil No. 2:95CV 1025C

DECLARATION OF WAYNE NORDWALL

Indian Affairs; WALTER R. MILLS, in his capacity as Area Director of the Bureau of Indian Affairs; and the BUREAU OF INDIAN AFFAIRS,

Third-Party Defendants.

Attached hereto is the declaration of Wayne Nordwall, Director of the Western Regional Office of the Bureau of Indian Affairs, Department of the Interior.

DATED this 12th day of June, 2000.

PAUL M. WARNER
United States Attorney

/s/ Stephen Roth
Stephen Roth
Assistant United States Attorney

DECLARATION

Pursuant to the provision of 28 U.S.C § 1746, the undersigned declares as follows:

1. I am employed as the Regional Director of the United States Bureau of Indian Affairs' Western Regional Office, 400 N. 5th Street, Phoenix, Arizona.

2. When the Shivwits Band's application and supporting documents for the trust acquisition of the two I-15 parcels were presented to this office by our Southern Paiute Field Office, Regional Office staff evaluated them and concluded that they were in compliance with applicable laws and regulations.

3. My office considers the door officially closed on acquisitions made under the Paiute Restoration Act (P. L. 96-227; 25 U.S.C. § 766) since Congress said in a subsequent 1984 Act that "[t]he transfer of the approximately four thousand seven hundred and seventy acres of land .... shall be in complete fulfillment of the provisions of Public Law 96-227 relating to the enlargement of the tribe's reservation." Since then, we have not used the Restoration Act as authority for any trust acquisitions. The Indian Reorganization Act, 25 U.S.C. § 465, and its regulations (Part 151) were the authority for this trust acquisition and for all others we have considered for the Paiute Tribe of Utah and its bands since 1984.

4. My office ensured that the Shivwits Band's application addressed the checklist in Part 151.10. In balancing the factors set forth at § 151.10(a)-(c), (e) and (h), we assumed that since no response was received from the City of St. George, Utah, to our Southern Paiute Field Office's letter of August 1, 1994, on the proposed trust acquisitions of the two parcels, that there would be no adverse impact on the local government. The Band, in order to be self-sufficient, had an enormous need to engage in some sort of economic development. We concluded this need would be served by this trust acquisition. We also concluded that the benefit to the Band outweighed the minor loss of tax dollars to the City of St. George. Although we did not include an analysis of part (f) of § 151.10 in our evaluation, I declare it was not deliberate but an oversight on our part.

5. The Department of the Interior has identified trust acquisitions as categorically excluded actions where there will be no immediate change in use of the land. These exclusions are listed in 516 DM 2, Appendix 1, and

516 DM 6, Appendix 4.4. Thus, a Categorical Exclusion Checklist was executed covering the two parcels. Since the two parcels were being acquired for economic development, this office amended the Checklist to make it clear that environmental documentation (an EA or EIS) would be necessary at the time of leasing. This is a normal procedure of the Bureau of Indian Affairs when a change in use for the land is known, but the change will not occur until some time after the land will be taken into trust.

6. The Southern Paiute Field Office did not provide notice to the State because the regulations require that the notice be provided to the state or local government. In this case the local government was the City of St. George.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 9th day of June, 2000.

By: /s/ Wayne Nordwall
Regional Director
Western Regional Office
Bureau of Indian Affairs